ARTICLE 2

APPLICATION OF THE CONVENTION

❖ Text of the provision*

(1) In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

(2) The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

(3) Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

❖ Reservations or declarations

None

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* Paragraph numbers have been added for ease of reference.

https://doi.org/10.1017/9781108979320.006 Published online by Cambridge University Press

A. Introduction

225 This provision is a central pillar of the Geneva Conventions as it establishes the circumstances and conditions under which the Conventions apply.[1] Article 2, common to the four Geneva Conventions, constituted a major step forward when adopted in 1949 as it addressed a lacuna in earlier international humanitarian law instruments. Indeed, neither the 1899 and 1907 Hague Conventions nor the 1864, 1906 and 1929 Geneva Conventions specified under what conditions their application would be triggered. In the absence of any explicit indication, it was generally understood that these instruments applied only during a declared war, with recognition by the belligerents that a state of war existed between them.

226 Article 2(1) broadens the Geneva Conventions' scope of application by introducing the notion of 'armed conflict', thereby making their application less dependent on the formalism attached to the notion of 'declared war'. In addition, Article 2(2) specifies that the Geneva Conventions apply to all kinds of foreign military occupation, even if such occupation does not meet with armed opposition during or after the invasion. In this regard, paragraph 2 complements paragraph 1 of Article 2, which covers situations of occupation resulting from hostilities between States. Article 2 – along with common Article 3 – contributes to establishing a distinction between international and non-international

[1] With the exception of common Article 3, which regulates non-international armed conflict. For more details, see the commentary on that article, in particular section C.

https://doi.org/10.1017/9781108979320.006 Published online by Cambridge University Press

armed conflict, a dichotomy confirmed over time by humanitarian law treaties adopted after the Geneva Conventions.

227 Common Article 2 plays a fundamental role in the humanitarian law architecture, even though non-international armed conflicts are now the most prevalent form of armed conflicts. Indeed, armed conflicts between States continue to arise, and Article 2 remains pertinent notwithstanding the UN Charter banning the resort to armed force between States as a means to settle their differences.[2] Given the political and emotional dimensions attached to the notion of war or armed conflict, States are frequently reluctant to admit that they are engaged in one. This renders Article 2(1) all the more relevant insofar as it clearly indicates that the Geneva Conventions and humanitarian law more generally apply based on objective criteria.

228 Article 2(3) confirms the abandonment of the *si omnes* clause,[3] which had previously been an obstacle to the effective application of humanitarian law to inter-State armed violence. It also allows a non-party State the possibility of applying the Geneva Conventions through express acceptance, which might be relevant when newly created States become involved in armed conflict before having ratified these instruments.

229 Common Article 2 also plays a role in determining the scope of application of Additional Protocol I.[4]

B. Historical background

230 The 1864, 1906 and 1929 Geneva Conventions did not contain a specific provision setting out their scope of application. In the 1930s, it became apparent that it would be useful to indicate precisely to which situations the 1929 Geneva Conventions on the Wounded and Sick and on Prisoners of War would apply, as some provisions in those Conventions referred to 'time of war' or similar expressions, which, if interpreted narrowly, might be understood to mean only cases of declared war.[5] At the same time, especially in the light of

[2] Except in situations of self-defence and when authorized by the UN Security Council; see UN Charter (1945), Articles 51 and 42, respectively.

[3] The *si omnes* clause found in early law-of-war treaties provided that if one Party to a conflict was not party to the instrument, no Parties were bound by the instrument. See, for instance, Article 2 of the 1907 Hague Convention (IV), which provides: 'The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting powers, and then only if all the belligerents are parties to the Convention.' A similar provision can be found in Article 24 of the 1906 Geneva Convention.

[4] Article 1(3) of Additional Protocol I provides: 'This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.'

[5] See e.g. Articles 24, 25 and 29 of the 1929 Geneva Convention on the Wounded and Sick. Article 37 of the same Convention refers to a 'state of war'. The 1929 Geneva Convention on Prisoners of War refers to 'the extreme event of a war' (Preamble), 'time of war' (Article 82) and 'state of war' (Article 95). Reacting to these concerns, the 15th International Conference of the Red Cross in Tokyo in 1934 adopted a resolution expressing the wish that the 1929 Conventions be applicable

https://doi.org/10.1017/9781108979320.006 Published online by Cambridge University Press

the Spanish Civil War, it became apparent that armed conflicts did not necessarily occur only between States and that the 1929 Conventions did not apply to 'civil wars'.[6] In addition, the experience of the Second World War brought to light the need to apply the Conventions to all situations of military occupation. The draft of common Article 2 that was approved by the International Conference of the Red Cross in Stockholm in 1948 and debated at the Diplomatic Conference of 1949 was designed to address all of these concerns.[7]

231 The aspects of the draft article specifying that the Conventions applied to all situations of armed conflict between States, including belligerent occupation, were uncontroversial and passed without debate.[8] The first three paragraphs of the article that was debated were almost identical to common Article 2 as it stands today. The element of draft article 2 that proved to be controversial was the proposed application in the fourth paragraph of the original text of Article 2 of the whole of the Conventions to non-international armed conflicts; that provision was modified and eventually became common Article 3.[9]

C. Paragraph 1: Applicability of the Conventions in peacetime

232 The first clause of common Article 2 serves as an important reminder that, although the Geneva Conventions become fully applicable in situations of armed conflict, States Parties have obligations already in peacetime. In

by analogy in case of armed conflict occurring between States even when war had not been declared. See *Revue internationale de la Croix-Rouge et Bulletin international des Sociétés de la Croix-Rouge*, Vol. 16, No. 191, November 1934, p. 899. See also *Report of the Preliminary Conference of National Societies of 1946*, pp. 14–15, and *Report of the Conference of Government Experts of 1947*, pp. 8, 102 and 272. See also fn. 30 of this commentary.

[6] ICRC, *Report on the Interpretation, Revision and Extension of the Geneva Convention of July 27, 1929*, Report prepared for the 16th International Conference of the Red Cross, London, 1938, pp. 7–8.

[7] Draft article 2 of the *Draft Conventions adopted by the 1948 Stockholm Conference* provided that:

> In addition to the stipulations which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
>
> If one of the Powers in conflict is not party to the present Convention, the Powers who are party thereto shall, notwithstanding be bound by it in their mutual relations.
>
> In all cases of armed conflict not of an international character which may occur in the territory of one or more of the High Contracting Parties, each of the adversaries shall be bound to implement the provisions of the present Convention. The Convention shall be applicable in these circumstances, whatever the legal status of the Parties to the conflict and without prejudice thereto.

[8] *Final Record of the Diplomatic Conference of 1949*, Vol. II-B, p. 128.

[9] For further details, see the commentary on common Article 3, paras 406–417.

particular, States must adopt and implement legislation to institute penal sanctions for grave breaches and take measures to suppress other violations of the Conventions; they must adopt and implement legislation to prevent misuse and abuse of the emblems; and they must train their armed forces to know and be able to comply with the Conventions and spread knowledge of them as widely as possible among the civilian population.[10] As training and education are usually most effective in one's own language, States should also translate the Conventions (and indeed all humanitarian law instruments) into the national language(s).[11]

233 Further obligations in the Conventions may best be implemented during armed conflicts if preparatory steps are taken already in peacetime to execute them. In relation to the Third Convention, this includes technical tasks, such as issuing identity cards to those liable to become prisoners of war, but also extends to more complex obligations, such as ensuring that the relevant personnel are properly trained, equipped and prepared to capture and detain enemy forces,[12] setting up a national information bureau[13] and adopting appropriate legislation.[14] Moreover, as the obligation to disseminate the Conventions underlines, training all members of the armed forces in all of their operations to treat prisoners of war humanely is a crucial peacetime task.[15]

[10] See Article 49 of the First Convention, Article 50 of the Second Convention, Article 129 of the Third Convention and Article 146 of the Fourth Convention (legislation on grave breaches and suppression of other violations); and Article 47 of the First Convention, Article 48 of the Second Convention, Article 127 of the Third Convention and Article 144 of the Fourth Convention (dissemination). See also Article 54 of the First Convention and Article 45 of the Second Convention (prevention of misuse of the emblem).

[11] Article 48 of the First Convention, Article 49 of the Second Convention, Article 128 of the Third Convention and Article 145 of the Fourth Convention require States to communicate official translations of the Conventions to one another.

[12] See Articles 17, 19 and 39. For specific obligations related to each Convention, see the commentary on common Article 2 in each of them.

[13] See also the commentary on Article 122, para. 4702.

[14] See the commentary on Article 82, para. 3568.

[15] In addition, States have obligations that continue to apply after an armed conflict is over (Article 6(4) of the Fourth Convention) or that must also apply after the conflict in order to be meaningful and effective (e.g. Articles 16 and 17 of the First Convention). The national information bureau referred to under Article 122 of the Third Convention (and its equivalent in Article 136 of the Fourth Convention), among others, must continue to function after a conflict. In addition to the obligations in the Geneva Conventions, States party to Additional Protocol I have specific peacetime obligations. These include training qualified personnel to facilitate the application of the Geneva Conventions and their Additional Protocols and ensuring the availability of legal advisers to advise military commanders when necessary (Articles 6(1) and 82 of Additional Protocol I, respectively). Other humanitarian law treaties also impose obligations in peacetime to ensure the effectiveness of the protection they provide during armed conflict. For example, the 1954 Hague Convention for the Protection of Cultural Property requires States Parties to prepare in time of peace for the safeguarding of cultural property (Article 3); to adapt their military regulations or instructions to ensure respect for the Convention (Article 7(1)); and to plan for or establish, within the armed forces, services or specialist personnel whose purpose is to secure respect for cultural property and to cooperate with the civilian authorities responsible for safeguarding it (Article 7(2)), among others).

D. Paragraph 1: Declared war or any other armed conflict between High Contracting Parties

234 Article 2(1) encompasses the concepts of 'declared war' and 'armed conflict'. Both trigger the application of the Geneva Conventions but cover different legal realities, the latter being more flexible and objective than the former. However, they are complementary, may even overlap, and cover a larger spectrum of belligerent relationships than was the case in the law prior to the 1949 Geneva Conventions.

235 The rationale of Article 2(1) is to extend the scope of application of the Geneva Conventions so that their provisions come into force even when hostilities between States do not result from a formal declaration of war. In this way, Article 2(1) serves the humanitarian purpose of the Geneva Conventions by minimizing the possibility for States to evade their obligations under humanitarian law simply by not declaring war or refusing to acknowledge the existence of an armed conflict.[16]

1. The concept of declared war

236 The concept of declared war in the Geneva Conventions corresponds to the concept of war as reflected in Article 2 of the 1899 Hague Convention (II), as well as in the preamble to the 1907 Hague Convention (III) relative to the opening of hostilities. The notion of declared war is more limited than that of armed conflict in Article 2(1) insofar as it is imbued with formalism and subjectivity. If the Geneva Conventions hinged only on the formal notion of war, their application would be contingent on the formal recognition (or creation) of a state of war by one of the belligerents through the issuance of a declaration of war. A declaration of war, which is unilateral in nature, triggers a state of war regardless of the position and behaviour of the addressee(s).[17] This notion is reiterated in Article 2(1), which confirms that a state of war exists even if not recognized by one of the belligerents.

237 Under the traditional theory of declared war, the mere fact that States are engaged in armed violence is insufficient to displace the law of peace and trigger the applicability of humanitarian law. Therefore, declared war in its legal meaning starts with a declaration of war,[18] which is interpreted as the only expression of the States' belligerent intent.

[16] For instance, by labelling their actions operations short of war or military operations other than war or by considering that they are just law enforcement operations to which humanitarian law does not apply.

[17] Dinstein, 2017, p. 32.

[18] See Hague Convention (III) (1907), Article 1: 'The contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war.'

238 The significance of a declaration of war was specified in 2005 by the Eritrea-Ethiopia Claims Commission, which stated that 'the essence of a declaration of war is an explicit affirmation of the existence of a state of war between belligerents'.[19] A declaration of war should be understood as 'a unilateral and formal announcement, issued by the constitutionally competent authority of a State, setting the exact point at which war begins with a designated enemy'.[20] Declared war will therefore mark the transition from the application of the law of peace to the law of war. It will also bring about other legal consequences, such as the application of the law of neutrality,[21] the potential disruption of diplomatic relations between belligerents[22] and the application of international prize law.[23]

239 The Geneva Conventions become automatically applicable even when a declaration of war is not followed by armed confrontations between the declaring State and its designated opponent(s).[24] Indeed, the declaration of war does not need to be underpinned by hostile actions against the enemy to make humanitarian law applicable.[25] Therefore, a State which confines itself to a declaration of war but does not participate in the fighting has to apply the Geneva Conventions. This also highlights the complementarity between the notion of declared war and the notion of armed conflict as the latter would need to be substantiated by hostile actions for humanitarian law to govern the conduct of those involved in the armed conflict within the meaning of Article 2(1).

240 Since the entry into force of the Geneva Conventions, States have rarely declared war. The adoption of the UN Charter in 1945 and the institution of a *jus ad bellum* regime rendering wars of aggression unlawful have resulted in a

[19] Eritrea-Ethiopia Claims Commission, *Jus Ad Bellum, Ethiopia's Claims*, Partial Award, 2005, para. 17.
[20] Dinstein, 2017, p. 32.
[21] The law of neutrality applies when a declaration of war has been issued and the related state of war recognized and also applies when an international armed conflict within the meaning of Article 2(1) of the Geneva Conventions has come into existence. See Michael Bothe, 'The Law of Neutrality', in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd edition, Oxford University Press, 2013, pp. 549–580, at 549; Wolff Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality', in Michael N. Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines. Essays in Honour of Yoram Dinstein*, Martinus Nijhoff Publishers, Leiden, 2007, pp. 543–568; Dietrich Schindler, 'Transformations in the Law of Neutrality since 1945', in Astrid J.M. Delissen and Gerard J. Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead. Essays in Honour of Frits Kalshoven*, Martinus Nijhoff Publishers, Dordrecht, 1991, pp. 367–386; and Wolff Heintschel von Heinegg, 'Wider die Mär vom Tode des Neutralitätsrechts', in Horst Fischer (ed.), *Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck*, Berliner Wissenschafts-Verlag, 2004, pp. 221–241.
[22] Greenwood, 1987, pp. 283–306.
[23] Wolff Heintschel von Heinegg, 'The Current State of International Prize Law', in Harry H.G. Post (ed.), *International Economic Law and Armed Conflict*, Martinus Nijhoff Publishers, Dordrecht, 1994, pp. 5–50.
[24] Milanovic/Hadzi-Vidanovic, p. 268; Kleffner, 2013, pp. 46–47.
[25] For instance, in the Second World War most Latin American States declared war against the Axis Powers but did not participate in any hostilities; see Schindler, p. 132.

significant decrease in the practice of States declaring war on one another. However, this does not necessarily mean that the notion of declared war has fallen into desuetude. Even if academic writers have claimed that the concept of war has disappeared,[26] the possibility for a State to issue a declaration of war cannot be discarded.[27] It would therefore be premature to conclude the demise of the concept of declared war, even if its progressive decline cannot be ignored.[28]

241 Maintaining the notion of declared war also serves a humanitarian purpose insofar as it makes it possible – even if States have not yet engaged in open hostilities – for enemy nationals who find themselves in the territory of the opposing Party to benefit from the protection conferred by humanitarian law should they be exposed to the adverse effects of a declaration of war and its correlative bellicose rhetoric and atmosphere. In such a case, States would have to treat civilians on their territories who are nationals of the opposing State in accordance with the Fourth Convention. The application of the Conventions in case of declared war would thus prove useful from a protection perspective and would fit with their humanitarian objectives.[29]

242 In the absence of a more objective definition of the conditions triggering the application of humanitarian law, the sole reliance on the concept of declared war and its correlative subjectivity could thwart the humanitarian objectives of the Geneva Conventions.[30] Consequently, in 1949 it was felt that there was a pressing need to dispense with the subjectivity and formalism attached to the notion of declared war and to ensure that the applicability of humanitarian law would mainly be premised on objective and factual criteria. Against this background, the Geneva Conventions introduced the fact-based concept of armed

[26] See Kolb, 2009, p. 161; Partsch, p. 252; and Marco Sassòli, 'La "guerre contre le terrorisme", le droit international humanitaire et le statut de prisonnier de guerre', *Annuaire canadien de droit international*, Vol. 39, 2001, pp. 211–252, at 215. It is also noteworthy that the ICTY in *Tadić* defined international armed conflict without any reference to 'war' (*Tadić* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, para. 70).

[27] International Law Association, Committee on the Use of Force, *Final Report on the Meaning of Armed Conflict in International Law*, The Hague Conference, 2010, pp. 7–8. See also Greenwood, 1987, p. 294: 'State practice suggest[s] that many States still regard the creation of a state of war as a possibility and thus, presumably, accept that war continues to exist as a legal institution.'

[28] Dinstein, 2017, p. 34.

[29] The application of the Geneva Conventions of 1949 in such circumstances is without prejudice to the parallel application of human rights law, whose applicable protections may complement those afforded by humanitarian law.

[30] The only thing that a State would have to do to avoid the strictures of the Geneva Conventions if the Conventions applied only to 'declared wars' would be to deny the existence of a state of war in the legal sense (owing to a lack of a declaration of war), even if armed confrontations take place. The most notorious example of this was the Sino-Japanese conflict that broke out in 1931, when China and Japan refused to recognize that a state of war existed between them despite their involvement in intensive military operations, the occupation of Manchuria and the high level of casualties (Voelckel, p. 10). Such a situation would result in legal uncertainty: if humanitarian law does not regulate such situations, what would be the applicable legal framework? In that case, those affected by the hostilities would be bereft of appropriate legal protection.

conflict, i.e. defined in its material rather than legal sense, in order to supplement the notion of declared war. Through this semantic shift, the drafters of the Geneva Conventions moved away from conditioning the applicability of the Geneva Conventions solely on the legal concept of war. The applicability of humanitarian law would thenceforth be not only related to the declared will of States but would also depend on objective and factual criteria stemming from the notion of armed conflict introduced in Article 2(1), making it applicable as soon as a State undertakes hostile military action(s) against another State.

2. The concept of armed conflict

243 As stated above, before the 1949 Geneva Conventions the rule prevailed that the laws of war were only applicable if there was a legal state of war between two or more States. Article 2(1) overcame this rigid rule by establishing that, besides declared war, the Geneva Conventions would also be applicable if a state of war was not recognized.[31] Since 1907, experience has shown that many armed conflicts, displaying all the characteristics of a war, may arise without being preceded by any of the formalities laid down in the 1907 Hague Convention (III).[32] It follows from Article 2(1) that the factual existence of an armed conflict suffices for humanitarian law to apply.[33] In addition, the notion of armed conflict under Article 2(1) includes the case of occupation resulting from hostilities or declared war.[34] Therefore, the main added value of the notion of armed conflict is to base the application of the Geneva Conventions on objective and factual criteria.

244 Indeed, Article 2(1) underlines the pre-eminence of the factual existence of armed conflict over the formal status of war. Therefore, the determination of the existence of an armed conflict within the meaning of Article 2(1) must be based solely on the prevailing facts demonstrating the *de facto* existence of hostilities between the belligerents, even without a declaration of war.

245 This view, besides being widely held by academic writers,[35] is also reflected in recent international decisions and in certain military manuals. Indeed, the ICTY and the ICTR have confirmed that the applicability of humanitarian law

[31] Dietrich Schindler, 'The Different Types of Armed Conflicts according to the Geneva Conventions and Protocols', *Collected Courses of the Hague Academy of International Law*, Vol. 163, 1979, pp. 117–164, at 131.
[32] Hague Convention (III) (1907), Article 1.
[33] International Law Association, Committee on the Use of Force, *Final Report on the Meaning of Armed Conflict in International Law*, The Hague Conference, 2010, p. 2.
[34] For a detailed analysis of the notion of occupation, see section E.
[35] See e.g. David, para. 1.52; Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts*, 3rd edition, Hart Publishing, Oxford, 2008, pp. 75–76; Kleffner, pp. 47–48; Geoffrey S. Corn *et al.* (eds), *The Law of Armed Conflict: An Operational Approach*, Wolters Kluwer Law & Business, New York, 2012, pp. 72 and 80; Gabriele Porretto and Sylvain Vité, 'The application of international humanitarian law and human rights to international organisations', *Research Papers Series No. 1*, Centre Universitaire de Droit

should be determined according to the prevailing circumstances instead of the subjective views of the Parties to the conflict.[36] For instance, the ICTY Trial Chamber stated in *Boškoski and Tarčulovski* that 'the question of whether there was an armed conflict at the relevant time is a factual determination to be made by the Trial Chamber upon hearing and reviewing the evidence admitted at trial'.[37] In a similar vein, the ICTR underlined in *Akayesu* that '[i]f the application of international humanitarian law depended solely on the discretionary judgment of the parties to the conflict, in most cases there would be a tendency for the conflict to be minimized by the parties thereto'.[38]

246 In this regard, one cannot discard the possibility that some States might be tempted to deny the existence of an armed conflict even if facts on the ground prove otherwise. Even if none of the Parties recognize the existence of a state of war or of an armed conflict, humanitarian law would still apply provided that an armed conflict is in fact in existence. How States characterize the armed confrontation does not affect the application of the Geneva Conventions if the situation evidences that the State concerned is effectively involved in hostile armed actions against another State. The fact that a State does not, for political or other reasons, explicitly refer to the existence of an armed conflict within the meaning of Article 2(1) in a particular situation does not prevent it from being legally classified as such. The UN Security Council has also, in a resolution for example, stated its own classification of a situation under humanitarian law.[39] The applicability of the Geneva Conventions is independent of

International Humanitaire, 2006, p. 32; and Shraga, 2008, pp. 83–84. See also International Law Association, Committee on the Use of Force, *Final Report on the Meaning of Armed Conflict in International Law*, The Hague Conference, 2010, p. 33: 'The *de jure* state or situation of armed conflict depends on the presence of actual and observable facts, in other words, objective criteria.'

[36] Even if most of these cases dealt with the determination of the existence of a non-international armed conflict, international tribunals' analyses are also relevant for situations of international armed conflict. Most of these decisions relied on the definition of armed conflict given in the ICTY's 1995 *Tadić* decision, which encompasses both international and non-international armed conflicts. In *Lubanga* and *Bemba*, the ICC Trial Chamber used the test established by the ICTY in *Tadić* in order to determine the existence of an armed conflict; see *Lubanga* Trial Judgment, 2012, paras 531–538, and *Bemba* Trial Judgment, 2016, para. 128. The ICC therefore admits implicitly that the existence of an armed conflict is to be determined based on the facts at the time.

[37] ICTY, *Boškoski and Tarčulovski* Trial Judgment, 2008, para. 174.

[38] ICTR, *Akayesu* Trial Judgment, 1998, para. 603. See also ICTY, *Milutinović* Trial Judgment, 2009, para. 125: 'The existence of an armed conflict does not depend upon the views of the parties to the conflict.' In the same vein, see *Blaškić* Trial Judgment, 2000, para. 82: 'Whatever the case, the parties to the conflict may not agree between themselves to change the nature of the conflict, which is established by the facts whose interpretation, where applicable, falls to the Judge.' See also United Kingdom, *Manual of the Law of Armed Conflict*, 2004, pp. 28–29, para. 3.2.3.

[39] Based on Article 103 of the 1945 UN Charter, it could be argued that a determination by the UN Security Council invoking Chapter VII would be binding. While this may have merit, such a conclusion would be doubtful if it would lead to ending or modifying obligations which are of a *ius cogens* nature. See e.g. Robert Kolb, *Peremptory International Law: Jus Cogens*, Hart Publishing, Oxford, 2015, pp. 119–121; Marco Sassòli, 'Legislation and Maintenance of Public

official pronouncements in order to avoid cases in which States could deny the protection of the Conventions.[40]

247 It should be noted that there is no central authority under international law to identify or classify a situation as an armed conflict. States and Parties to a conflict need to determine the legal framework applicable to the conduct of their military operations. For its part, the ICRC makes an independent determination of the facts and systematically classifies situations for the purposes of its work. It is a task inherent in the role that the ICRC is expected to exercise under the Geneva Conventions, as set forth in the Statutes of the International Red Cross and Red Crescent Movement.[41] Other actors such as the United Nations and regional organizations may also need to classify situations for their work, and international and national courts and tribunals need to do so for the purposes of exercising their jurisdiction. In all cases, the classification must be made in good faith, based on the facts and the relevant criteria under humanitarian law.[42]

248 A determination based on the prevailing facts should also conform to – and help preserve – the strict separation of *jus in bello* from *jus ad bellum*.[43] Indeed, by virtue of this distinction, the determination of the existence of an armed

Order and Civil Life by Occupying Powers', *European Journal of International Law*, Vol. 16, No. 4, 2005, pp. 661–694, at 680–682 and 684.

[40] See ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Report prepared for the 31st International Conference of the Red Cross and Red Crescent, Geneva, 2011, p. 8, and Vité, p. 72.

[41] Statutes of the International Red Cross and Red Crescent Movement (1986), Article 5.

[42] As international law is a self-applied system, it is possible that different actors will have different views of the same facts. In any case, it is the facts that determine whether a situation constitutes an international armed conflict, a non-international armed conflict or not an armed conflict at all.

[43] Besides treaty law (common Article 1 and the preamble to Additional Protocol I), international and domestic tribunals, numerous academic writers and many military manuals confirm the validity and relevance not only of the strict separation between *jus in bello* and *jus ad bellum* but also of its corollary, the principle of equality of belligerents before humanitarian law. In particular, the judgment by the US Military Tribunal at Nuremberg in the *Hostages case* in 1948 forms a landmark decision in relation to the strict separation between *jus ad bellum* and *jus in bello*. Other judgments concerning war crimes perpetrated during the Second World War have followed the same approach and confirmed the importance of maintaining the strict separation (see Okimoto, p. 17, and Orakhelashvili, pp. 167–170). Following the path of this consistent case law, academic writers have been overwhelmingly supportive of the strict separation and have confirmed that the legal status of the belligerents under *jus ad bellum* should not affect the applicability or the application of humanitarian law: see e.g. Hersch Lauterpacht, *Oppenheim's International Law*, 6th edition, Longman's, Green and Co., London, 1940, pp. 174–175; Charles Rousseau, *Le droit des conflits armés*, Pedone, Paris, 1983, pp. 24–26; Myres S. McDougal and Florentino P. Feliciano, *The International Law of War: Transnational Coercion and World Public Order*, New Haven Press, 1994, pp. 530–542; Dinstein, 2017, pp. 177–185; Leslie C. Green, *The Contemporary Law of Armed Conflict*, 2nd edition, Manchester University Press, 2000, pp. 18–19; Christopher Greenwood, 'International Humanitarian Law (Laws of War): Revised Report for the Centennial Commemoration of the First Hague Peace Conference 1899', in Frits Kalshoven (ed.), *The Centennial of the First International Peace Conference: Reports and Conclusions*, Kluwer, The Hague, 2000, pp. 173–192; François Bugnion, 'Guerre juste, guerre d'agression et droit international humanitaire', *Revue internationale de la Croix-Rouge*, Vol. 84, No. 847, September 2002, pp. 523–546; Okimoto; Sassòli, 2007, pp. 241–264; Christopher Greenwood, 'The relationship

conflict and the related applicability of international humanitarian law depend only on the circumstances prevailing on the ground and not on whether the use of force against another State is permitted under the UN Charter. Whether a State uses force in accordance with its right of self-defence, because it has been authorized to do so by a UN Security Council mandate, or in violation of the prohibition on the use of force does not affect the determination of the existence of an international armed conflict. The mandate and the actual or perceived legitimacy of a State to resort to armed force are issues which fall within the province of *jus ad bellum* and have no effect on the applicability of international humanitarian law to a specific situation involving two or more High Contracting Parties.

249 The very object and purpose of international humanitarian law – to protect those who are not or no longer taking part in the hostilities during armed conflict – would be defeated were the application of that body of law made dependent on the lawfulness of the conflict under *jus ad bellum*. To conclude that humanitarian law does not apply or applies differently to a belligerent that is waging an armed conflict that it deems 'just' or 'legitimate' would arbitrarily deprive the victims of that conflict of the protections due to them. It would also open the door for Parties to armed conflicts to deny their legal obligations under humanitarian law by branding the enemy's use of force as unlawful or by emphasizing their international legitimacy. Humanitarian law ignores such distinctions and applies equally to all States involved in the conflict.

a. The constitutive elements of the definition of armed conflict

250 Article 2(1) speaks merely of 'any other armed conflict which may arise between two or more of the High Contracting Parties'. While it defines the Parties to an international armed conflict, it does not provide a definition of armed conflict. The main purpose of introducing the notion of armed conflict in Article 2(1) was to provide an objective standard to be assessed on the basis of the prevailing facts.

251 State practice, case law and academic literature have developed the legal contours of the notion of armed conflict and provided insight into how Article 2(1) should be interpreted. Armed conflicts in the sense of Article 2(1) are those which oppose High Contracting Parties (i.e. States) and occur when one or more States have recourse to armed force against another State, regardless of the reasons for or the intensity of the confrontation.[44] In *Tadić*, the ICTY

between *jus ad bellum* and *jus in bello*', *Review of International Studies*, Vol. 9, No. 4, 1983, pp. 221–234; Ryan Goodman, 'Controlling the recourse to war by modifying *jus in bello*', *Yearbook of International Humanitarian Law*, Vol. 12, 2009, pp. 53–84; and Jasmine Moussa, 'Can *jus ad bellum* override *jus in bello*? Reaffirming the separation of the two bodies of law', *International Review of the Red Cross*, Vol. 90, No. 872, December 2008, pp. 963–990.

[44] ICRC, 'How is the term "armed conflict" defined in international humanitarian law?', Opinion Paper, March 2008, p. 1. The 1958 Commentary on the Fourth Geneva Convention also played

stated that 'an armed conflict exists whenever there is a resort to armed force between States'.[45] This definition has since been adopted by other international bodies and is generally considered as the contemporary reference for any interpretation of the notion of armed conflict under humanitarian law.

252 All the foregoing shows that the notion of armed conflict under Article 2(1) requires the hostile resort to armed force involving two or more States.[46]

i. The legal status of the belligerents: 'between two or more of the High Contracting Parties'

253 By virtue of common Article 2(1), the 1949 Geneva Conventions apply to 'all cases of ... armed conflict which may arise between two or more of the *High Contracting Parties*, even if the state of war is not recognized by one of them' (emphasis added). The expression 'High Contracting Parties' refers to the States for which these instruments are in force.[47] The situations referred to in Article 2(1) are therefore limited to armed conflicts between opposing States.[48]

254 Under Article 2(1), the identity of the actors involved in the hostilities – States – will therefore define the international character of the armed conflict.[49] In this regard, statehood remains the baseline against which the existence of an armed conflict under Article 2(1) will be measured.

an important role in clarifying the notion of 'armed conflict'; see Pictet (ed.), *Commentary on the Fourth Geneva Convention*, Geneva, 1958, pp. 20–21.

[45] ICTY, *Tadić* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, para. 70.

[46] ICRC, 'How is the term "armed conflict" defined in international humanitarian law?', Opinion Paper, March 2008, p. 1.

[47] The expression 'High Contracting Parties' as used in the Conventions must be understood in the sense given by Article 2(1)(g) of the 1969 Vienna Convention on the Law of Treaties to the word 'party', namely 'a State which has consented to be bound by the treaty and for which the treaty is in force'. See Kritsiotis, p. 275: 'The transposition of "States" instead of "High Contracting Parties" as the actors who enter the legal relationship that is called an "international armed conflict" is, of course, a necessary move for the [ICTY] Appeals Chamber to have made in defining the concept of an international armed conflict from the perspective of custom given the intrinsically conventional idiom of *High Contracting Parties*.'

[48] Contemporary armed conflicts show that, besides States, international organizations such as the UN or NATO can be involved in armed conflict. See ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Report prepared for the 31st International Conference of the Red Cross and Red Crescent, Geneva, 2011, pp. 30–33, and Ferraro, 2012a. However, the Geneva Conventions do not as such apply to international organizations. International organizations cannot be signatories of the Geneva Conventions and thus cannot become High Contracting Parties, but they are bound by customary international humanitarian law.

[49] In its efforts post-9/11 to eradicate the threat from al-Qaeda, the US Government qualified the situation as an international armed conflict even though one Party was not a State (see *Hamdan case*, Government Brief on the Merits, 2006). Following the US Supreme Court's decision in *Hamdan* that common Article 3 applies to that situation, the US Government has considered it to be a transnational non-international armed conflict. See United States, Supreme Court, *Hamdan case*, Judgment, 2006, pp. 629–631; John B. Bellinger, 'Prisoners in War: Contemporary Challenges to the Geneva Conventions', lecture at the University of Oxford, 10 December 2007, reported in *American Journal of International Law*, Vol. 102, pp. 367–370. See also Marko Milanovic, 'Lessons for human rights and humanitarian law in the war on terror:

255 When dealing with the notion of armed conflict contained in Article 2(1), the 1958 Commentary on the Fourth Geneva Convention refers to '[a]ny difference arising *between* two States and leading to the *intervention of members of the armed forces*'.[50] However, this would mean that for an armed conflict to exist in the sense of Article 2(1), the simultaneous involvement of at least two opposing States through their armed forces is required. That interpretation is too narrow.

256 Such a position would in fact exclude from the scope of armed conflict the unilateral use of force by one State against another. This reading of Article 2(1) would be at odds with the object and purpose of the Geneva Conventions, which is to regulate any kind of use of armed force involving two or more States. An armed conflict can arise when one State unilaterally uses armed force against another State even if the latter does not or cannot respond by military means. The unilateral use of armed force presupposes a plurality of actors and still reflects an armed confrontation involving two or more States, the attacking State and the State(s) subject to the attack, therefore satisfying the requirement of Article 2(1). The fact that a State resorts to armed force against another suffices to qualify the situation as an armed conflict within the meaning of the Geneva Conventions. In this perspective, the declaration, establishment and enforcement of an effective naval or air blockade, as an 'act of war', may suffice to initiate an international armed conflict to which humanitarian law would also apply.[51] In a similar vein, an unconsented-to invasion or deployment of a State's armed forces on the territory of another State – even if it does not meet with armed resistance – could constitute a unilateral and hostile use of armed force by one State against another, meeting the conditions for an international armed conflict under Article 2(1).[52]

257 Similarly, the use of armed force not directed against the enemy's armed forces but only against the enemy's territory, its civilian population and/or civilian objects, including (but not limited to) infrastructure, constitutes an international armed conflict for the purposes of Article 2(1). Under

comparing *Hamdan* and the Israeli *Targeted Killings* case', *International Review of the Red Cross*, Vol. 89, No. 866, June 2007, pp. 373–393.

[50] Pictet (ed.), *Commentary on the Fourth Geneva Convention*, ICRC, 1958, p. 20 (emphasis added). In a similar vein, Pictet defined international armed conflict as 'any opposition between two states involving the intervention of their armed forces and the existence of victims'; see Jean S. Pictet, *Humanitarian Law and the Protection of War Victims*, Henry Dunant Institute, Geneva, 1975, p. 52. The ICTY in *Tadić* uses almost the same formula and affirms that 'armed conflict exists whenever there is resort to armed force *between* States' (emphasis added); *Tadić* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, para. 70. See also Kritsiotis, p. 274.

[51] Wolff Heintschel von Heinegg, 'Naval Blockade', in Michael N. Schmitt (ed.), *International Law Across the Spectrum of Conflict: Essays in Honour of Professor L.C. Green on the Occasion of his Eightieth Birthday*, International Law Studies, U.S. Naval War College, Vol. 75, 2000, pp. 203–230, at 204.

[52] This would be the case when such unilateral military action is not the result of mistakes or *ultra vires* actions (see paras 269–277 of this commentary).

humanitarian law, the existence of an international armed conflict does not require that the persons and/or objects targeted necessarily be part of the executive authority, nor is it conditioned on the attack only being directed against the government in place.[53] International armed conflicts are fought between States. The government is only one of the constitutive elements of the State, while the territory and the population are the other constitutive elements. Therefore, any attack directed against the territory, population, or the military or civilian infrastructure constitutes a resort to armed force against the State to which this territory, population or infrastructure belongs.[54]

258 The existence of an international armed conflict presupposes the involvement of the armed forces of at least one of the opposing States.[55] Indeed, armed conflict presumes the deployment of military means in order to overcome the enemy or force it into submission, to eradicate the threat it represents or to force it to change its course of action. When classic means and methods of warfare – such as the deployment of troops on the enemy's territory, the use of artillery or the resort to jetfighters or combat helicopters – come into play, it is uncontroversial that they amount to an armed confrontation between States and that the application of the Geneva Conventions is triggered.

259 However, one should not discard outright the possibility that armed conflict within the meaning of Article 2(1) may come into existence even if the armed confrontation does not involve military personnel but rather non-military State agencies such as paramilitary forces, border guards or coast guards.[56] Any of those could well be engaged in armed violence displaying the same characteristics as that involving State armed forces.

260 In the naval context, under international law applicable at sea, States may, in certain circumstances, lawfully use force against a vessel owned or operated by another State, or registered therein. This may be the case, for example, when coast guards, suspecting a violation of their State's fisheries legislation, attempt to board such a vessel but meet with resistance. The use of force in the course of this and other types of maritime law enforcement operations is regulated by legal notions akin to those regulating the use of force under human rights law.[57] In principle, such measures do not constitute an international armed

[53] Akande, p. 75.
[54] See paras 269–277 of this commentary.
[55] See Milanovic/Hadzi-Vidanovic, p. 274; Schindler, p. 131; and David, para. 1.58.
[56] It has sometimes been argued that because the use of force between States during minor and/or sporadic armed clashes involved non-military agencies, such a situation should not be read as an international armed conflict and would not be governed by humanitarian law. See Arimatsu, p. 77.
[57] Examples of relevant cases setting out the legal framework include: ICJ, *Fisheries Jurisdiction case (Spain* v. *Canada)*, Jurisdiction of the Court, Judgment, 1998, para. 84; International Tribunal for the Law of the Sea, *The M/V 'Saiga' (No. 2) case*, Judgment, 1999, paras 155–159 (see also the last paragraph of the Separate Opinion of Judge Anderson); and Arbitral Tribunal constituted Pursuant to Article 287, and in accordance with Annex VII, of the United Nations Convention on the Law of the Sea, *In the Matter of an Arbitration between Guyana and*

conflict between the States affiliated with the vessels, in particular where the force is exercised against a private vessel. It cannot be excluded, however, that the use of force at sea is motivated by something other than a State's authority to enforce a regulatory regime applicable at sea. Depending on the circumstances, such a situation may qualify as an international armed conflict.

261 The question of 'who' is involved in the armed opposition between States should not significantly affect the classification of the situation as an international armed conflict. When a State resorts to means and methods of warfare against another State, that situation qualifies as an international armed conflict, irrespective of the organ within that State that has resorted to such means and methods.

262 Even if armed conflicts under Article 2(1) generally imply the deployment and involvement of military means, there might be situations in which the use of force by other State officials or persons qualified as 'agents' of a State would suffice. However, only the use of force by the *de jure* or *de facto* organs of a State, but not by private persons, will constitute an armed conflict.[58] The ICC Pre-trial Chamber followed a similar reasoning in *Bemba*, concluding that 'an international armed conflict exists in case of armed hostilities between States through their respective armed forces or *other actors acting on behalf of the State*'.[59]

263 These positions emphasize that non-military State agencies, even if not formally integrated into the armed forces, can be at the origin of an armed conflict provided they qualify as an organ of the State concerned. To limit the existence of an international armed conflict to the involvement on both sides

Suriname, Award of the Arbitral Tribunal, Registry: The Permanent Court of Arbitration, The Hague, 17 September 2007, para. 445. See, further, *Claim of the British Ship 'I'm Alone'* v. *United States*, Joint Interim Report of the Commissioners, 30 June 1933, in *American Journal of International Law*, Vol. 29, 1936, pp. 326–331, and 'Investigation of certain incidents affecting the British Trawler *Red Crusader*', Report of 23 March 1962 of the Commission of Enquiry established by the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Denmark on 15 November 1961, *International Law Reports*, Vol. 35, 1962, p. 485. For academic literature, see Efthymios Papastavridis, *The Interception of Vessels on the High Seas*, Hart Publishing, Oxford, 2014, pp. 68–72; Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, Cambridge University Press, 2009, pp. 271–272; Patricia Jimenez Kwast, 'Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in Light of the *Guyana/Suriname* Award, *Journal of Conflict and Security Law*, Vol. 13, No. 1, 2008, pp. 49–91; Natalie Klein, *Maritime Security and the Law of the Sea*, Oxford University Press, 2001, pp. 62–146; Ivan Shearer, 'The Development of International Law with Respect to the Law Enforcement Roles of Navies and Coast Guards in Peacetime', *International Law Studies*, U.S Naval War College, Vol. 71, 1998, pp. 429–453; and Anna van Zwanenberg, 'Interference with Ships on the High Seas', *International and Comparative Law Quarterly*, Vol. 10, No. 4, 1961, pp. 785–817.

[58] Greenwood, 2008, p. 48.

[59] ICC, *Bemba* Decision on the Confirmation of Charges, 2009, para. 223 (emphasis added). This approach was also applied at trial; see *Bemba* Trial Judgment, 2016, paras 654–656. For a more detailed analysis of the situation in which international armed conflict is determined on the basis of a State's control over non-State armed groups located in the territory of its enemy, see paras 298–306 of this commentary.

of their armed forces as defined in their domestic law would allow States to bypass the application of humanitarian law by using non-military agencies or other surrogates not officially considered members of the armed forces. Such an interpretation of Article 2(1) would lead to a result which is manifestly unreasonable as it would defeat the protective goal of the Geneva Conventions.

264 One of the recurrent problems in determining the existence of an international armed conflict is whether one of the Parties thereto claiming statehood is effectively a State as defined under international law. This issue can be encountered notably at the occasion of a secessionist project or the disintegration of a State as a consequence of a non-international armed conflict.[60] In this regard, it is possible that what started as a non-international armed conflict becomes international if the secessionist entity is successful in becoming a State by fulfilling the criteria for statehood under international law. The statehood of the belligerents, which determines the nature of the armed conflict as an international armed conflict, is ascertained by objective criteria under international law, which carry their own complexities.[61] The fact that one of the Parties does not recognize the other as a State is irrelevant.

265 In a similar vein, the legal status of the belligerents also raises some problems in relation to a State's representation. While it is clear that international armed conflicts are fought between States, the question of who gets to represent those States may be a thorny issue.[62] The determination of which entity is the government of a State matters because a number of international law issues turn on that question, in particular the nature of an armed conflict involving the government of that State. Indeed, answering this question may have some impact on the classification of the armed conflict at its very beginning or on its reclassification over time if the government changes as a result of a transitional/political process or a military victory of a non-State armed group.[63]

[60] For instance, the ICTY had to identify whether Croatia had become a State in order to determine whether the conflict in the former Yugoslavia was an international armed conflict. See ICTY, *Slobodan Milošević* Decision on Motion for Judgment of Acquittal, 2004, paras 85–93.

[61] See Montevideo Convention on the Rights and Duties of States (1933), Article 1 ('The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.')

[62] Milanovic/Hadzi-Vidanovic, p. 279.

[63] See e.g. Letter from the ICRC legal adviser to the UK House of Commons (Select Committee on International Development), 20 December 2002:

> In response to the questions raised, I would nevertheless like to seize this opportunity to inform the International Development Committee on the ICRC's legal qualification of the conflict in Afghanistan and some implications thereof.
>
> It may be recalled in particular that the ICRC regarded the four Geneva Conventions of 12 August 1949 as being fully applicable to the armed conflict which commenced in Afghanistan on 7 October 2001. The ICRC had therefore qualified this conflict as an international armed conflict.
>
> Following the convening of the Loya Jirga in Kabul in June 2002 and the subsequent establishment of an Afghan transitional government on 19 June 2002 which not only received unanimous recognition by the entire community of States but could also claim

266 However, the fact that an incumbent government has been defeated does not in itself divest the armed conflict of its initial international character, nor does the establishment of a puppet government by the victorious belligerent. The only possible way the nature of the armed conflict could change as a result of the defeat of the former government is to ascertain that the new government is effective and consents to the presence or military operations of foreign forces in its territory, unless, however, it is instituted by an Occupying Power.[64]

267 Under international law, the key condition for the existence of a government is its effectiveness, that is, its ability to exercise effectively functions usually assigned to a government within the confines of a State's territory, including the maintenance of law and order.[65] Effectiveness is the ability to exert State functions internally and externally, i.e. in relations with other States.[66]

268 The problem might also come from a divided State, where there are competing claims to be the government of a State. Such a situation existed in Afghanistan in 2001, in Côte d'Ivoire in 2010–11 and in Libya in 2011. In this regard, it does not matter that a government failed to gain recognition by the international community at large. The very fact that the said government is effective and in control of most of the territory of the State concerned means that it is the *de facto* government and its actions have to be treated as the actions of the State it represents with all the consequences this entails for determining the existence of an international armed conflict.[67]

broad-based recognition within Afghanistan through the Loya Jirga process the ICRC has changed its initial qualification as follows: The ICRC no longer views the ongoing military operations in Afghanistan directed against suspected Taliban or other armed groups as an international armed conflict.

Hostilities conducted by United States and allied forces against groups such as the Taliban and al-Qaeda in Afghanistan after 19 June 2002 are therefore governed by the rules applicable to situations of non-international armed conflict, since the military operations in question are being carried out with the consent of the government of a recognized sovereign State, the Islamic State of Afghanistan.

[64] See Fourth Convention, Article 47. In situations in which, during an occupation, a local government emerges 'with a good deal of authority and credibility, and accepted as being a representative body', its consent could potentially change the nature of the armed conflict. See ICRC, *Occupation and Other Forms of Administration of Foreign Territory*, p. 29.

[65] Hersch Lauterpacht, 'Recognition of Governments: I', *Columbia Law Review*, Vol. 45, 1945, pp. 815–864, especially at 825–830; Malcolm N. Shaw, *International Law*, 8th edition, Cambridge University Press, 2017, pp. 336–340.

[66] This factor is considered by some to be a legitimacy factor. For further discussion, see Jean d'Aspremont, 'Legitimacy of Governments in the Age of Democracy', *New York University Journal of International Law and Politics*, Vol. 38, 2006, pp. 877–917; see also Hersch Lauterpacht, 'Recognition of Governments: I', *Columbia Law Review*, Vol. 45, 1945, pp. 815–864, especially at 830–833, and Malcolm N. Shaw, *International Law*, 8th edition, Cambridge University Press, 2017, p. 338.

[67] Dinstein, 2004, p. 888. See also Christopher Greenwood, 'International law and the "war against terrorism"', *International Affairs*, Vol. 78, No. 2, April 2002, pp. 301–317, at 312–313. The issue of State representation will also have some importance in relation to the situation in which a third State intervenes in the territory of another one. In this case, the applicability of humanitarian law and the correlative determination of the nature of the armed conflict will revolve around the notion of consent. In this regard, the identity of the consenter and its ability

ii. Intensity of the armed confrontation

269 For international armed conflict, there is no requirement that the use of armed force between the Parties reach a certain level of intensity before it can be said that an armed conflict exists. Article 2(1) itself contains no mention of any threshold for the intensity or duration of hostilities. Indeed, in the frequently cited 1958 commentary on common Article 2, Pictet stated:

> Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to the human person as such is not measured by the number of victims.[68]

Furthermore, it makes no difference 'how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4' of the Third Convention.[69] This view remains pertinent today.

270 Even minor skirmishes between the armed forces, be they land, air or naval forces, would spark an international armed conflict and lead to the applicability of humanitarian law.[70] Any unconsented-to military operations by one State in the territory of another State, including its national airspace and territorial sea, should be interpreted as an armed interference in the latter's sphere of sovereignty and thus may be an international armed conflict under Article 2(1). In the naval context, the innocent passage of foreign ships, including warships, in the territorial sea of another State is foreseen by the 1982 UN Convention on the Law of the Sea, in particular Articles 18–19. Such passage does not constitute an international armed conflict within the meaning of common Article 2.

271 In the decades since the adoption of the Conventions, there has been practice and doctrine in support of this interpretation. Some States, for example, have considered that an international armed conflict triggering the application of the Geneva Conventions had come into existence after the capture of just one member of their armed forces.[71] The lack of a requirement of a certain level of intensity has also been endorsed by international tribunals, with, for example, the ICTY holding that 'the existence of armed force between States is sufficient of itself to trigger the application of international

to give consent will be crucial elements to take into consideration. See paras 290–297 of this commentary.

[68] Pictet (ed.), *Commentary on the Fourth Geneva Convention*, ICRC, 1958, pp. 20–21.

[69] Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, 1960, p. 23.

[70] The Office of the Prosecutor of the ICC used the same low threshold approach, notably in relation to a naval incident that occurred in 2010 in the Yellow Sea; see *Situation in the Republic of Korea*: *Article 5 Report*, June 2014, paras 45–46.

[71] *Digest of United States Practice in International Law* (1981–1988), Vol. III, 1993, p. 3456. See also Sassòli, 2008, p. 94, and Berman, p. 39.

humanitarian law'.[72] This view is also shared by a significant number of academic experts.[73]

272 There are compelling protection reasons for not linking the existence of an international armed conflict to a specific level of violence. This approach corresponds with the overriding purpose of the Geneva Conventions, which is to ensure the maximum protection of those whom these instruments aim to protect.[74] For example, under the Third Convention, if members of the armed forces of a State in dispute with another fall into enemy hands, they are eligible for prisoner-of-war status regardless of whether there is full-fledged fighting between the two States. Prisoner-of-war status and treatment are well defined under the Geneva Conventions, including the fact that a prisoner of war may not be prosecuted by the detaining State for lawful acts of war.[75] In the absence of a classification of a situation as an armed conflict, detained military personnel would not enjoy equivalent legal protection under the domestic law of the detaining State, even when supplemented by international human rights law.[76]

273 This approach also permits the application of humanitarian law to the opening phase of the hostilities, thereby avoiding the uncertainty surrounding the period during which one would try to observe whether a given threshold of intensity has been reached.[77]

274 It is important, however, to rule out the possibility of including in the scope of application of humanitarian law situations that are the result of a mistake or of individual *ultra vires* acts, which – even if they might entail the international responsibility of the State to which the individual who committed the acts belongs – are not endorsed by the State concerned. Such acts would not amount to armed conflict.[78] The existence of an international armed conflict is determined by the occurrence of hostilities against the population, armed forces or territory of another State, carried out by State agents acting in an official capacity and under instructions or by other persons specifically

[72] ICTY, *Delalić* Trial Judgment, 1998, para. 184 (see also para. 208); *Tadić* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, para. 70; ICC, *Lubanga* Decision on the Confirmation of Charges, 2007, para. 207. The Special Court for Sierra Leone (SCSL) used the definition of international armed conflict proposed by the ICTY in *Tadić*; see SCSL, *Taylor* Trial Judgment, 2012, paras 563–566.

[73] See Hans-Peter Gasser, 'International humanitarian law: An introduction', in Hans Haug (ed.), *Humanity for All: The International Red Cross and Red Crescent Movement*, Henry Dunant Institute, Geneva, 1993, pp. 510–511; David, para. 1.58; Kolb, 2003, p. 73; Milanovic/Hadzi-Vidanovic, p. 274; Kritsiotis, pp. 278–279; Clapham, pp. 13–16. Schmitt, 2012b, pp. 459–461; and Grignon, p. 75, fn. 255.

[74] Arimatsu, p. 76.

[75] See Introduction, para. 20, and the commentaries on Article 85, para. 3634, and on Article 99, section C.2.

[76] ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Report prepared for the 31st International Conference of the Red Cross and Red Crescent, Geneva, 2011, p. 7.

[77] See also the commentary on common Article 3, paras 456–471.

[78] Berman considers, however, that a low threshold approach takes no account of accidents (pp. 39–40).

instructed to carry out such hostilities by State agents or organs, and not done in error.[79] When a situation objectively shows for example that a State is effectively involved in military operations or any other hostile actions against another State, neutralizing enemy military personnel or assets, hampering its military operations or using/controlling its territory, it is an armed conflict. The existence of an armed conflict must be deduced from the facts.

275 It must be acknowledged, however, that some consider that hostilities must reach a certain level of intensity to qualify as an armed conflict under Article 2(1).[80] Isolated or sporadic inter-State use of armed force is sometimes described as a 'border incursion', 'naval incident', 'clash' or other kind of 'armed provocation', leading some to suggest that such situations would not qualify as international armed conflicts because of their short duration or the low intensity of the violence involved.[81]

276 Indeed, States might not publicly acknowledge such situations as armed conflicts and may describe them simply as 'incidents'. They may also choose not to respond with violence to an attack against their military personnel or populations, or on their soil. Nevertheless, given that humanitarian law applies based on the facts, the fact that a State publicly uses a term other than 'armed conflict' to describe a situation involving hostilities with another State is not in itself determinative of the classification of that situation as an armed conflict. Moreover, once States start using force against one another, humanitarian law provides a recognized framework to protect all those who are affected. If minor clashes between States are not considered to be an international armed conflict or if the very beginning of hostilities is not regulated by humanitarian law, one would have to identify an alternative in terms of the applicable law. Human rights law and domestic law do not seem to be equipped to deal fully with inter-State violence. For its part, the *jus ad bellum* provides a general framework on the lawfulness of the recourse to the use of force but contains only very general rules on the way force may be used.[82] Once force is actually being used by one State against another, humanitarian law provides detailed rules that are well tailored to inter-State armed confrontations. It is therefore logical and in conformity with the humanitarian purpose of the Conventions that there be no requirement of a specific level of intensity of violence to trigger an international armed conflict.

[79] See e.g. Vité, p. 72; Kritsiotis, p. 262; David, para. 159; Françoise J. Hampson, 'The relationship between international humanitarian law and human rights law from the perspective of a human rights treaty body', *International Review of the Red Cross*, Vol. 90, No. 871, September 2008, pp. 549–572, at 553; Nils Melzer, *Targeted Killing in International Law*, Oxford University Press, 2008, p. 250; and Ferraro, 2012b, p. 19.

[80] International Law Association, Committee on the Use of Force, *Final Report on the Meaning of Armed Conflict in International Law*, The Hague Conference, 2010, pp. 32–33.

[81] *Ibid.* pp. 32–33; Kleffner, 2013, p. 45. See also Marouda, pp. 204–207.

[82] See Article 51 of the 1945 UN Charter, in combination with the requirements of necessity and proportionality.

277 Lastly, it should be recalled that the application of the Conventions does not necessarily presuppose large-scale hostilities.[83] It all depends on the circumstances. With regard to the Third Convention specifically, in the ICRC's view, it suffices in the context of the foregoing that a member of the armed forces has been captured by another State to trigger the application of the Convention.[84] In such a case, the Third Convention applies as soon as that person has fallen into enemy hands.[85]

b. Specific issues in relation to the notion of international armed conflict

i. Armed conflict involving multinational forces

278 No provision of international humanitarian law precludes States or an international organization sending multinational forces[86] from becoming Parties to an armed conflict if the classic conditions for the applicability of humanitarian law are met. By virtue of the strict separation between *jus in bello* and *jus ad bellum* addressed above, the applicability of humanitarian law to multinational forces, just as to any other actors, depends only on the circumstances on the ground, regardless of any international mandate given by the UN Security Council and of the designation given to the Parties potentially opposing them. This determination will be based on the fulfilment of specific legal conditions stemming from the relevant norms of humanitarian law, i.e. common Article 2(1) for international armed conflict and common Article 3 for non-international armed conflict.[87] The mandate and the legitimacy of a mission entrusted to

[83] See also para. 270 of this commentary.

[84] Similarly, see Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, 1960, p. 23: '[I]t suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4. Even if there has been no fighting, the fact that persons covered by the Convention are detained is sufficient for its application. The number of persons captured in such circumstances is, of course, immaterial.'; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Report prepared for the 31st International Conference of the Red Cross and Red Crescent, Geneva, 2011, p. 7. See also Kolb/Porretto/Vité, *L'application du droit international humanitaire et des droits de l'homme aux organisations internationales: forces de paix et administrations civiles transitoires*, Bruylant, Brussels, 2005, p. 177; and Okimoto, p. 50. But see Carron, pp. 197–199.

[85] See Article 5(1).

[86] The term 'multinational forces' used in this section describes the armed forces put by troop-contributing countries at the disposal of a peace operation. There is no clear-cut definition of peace operations in international law. The terms 'peace operations', 'peace-support operations', 'peacekeeping operations' and 'peace-enforcement operations' do not appear in the UN Charter. They may be interpreted in various ways and are sometimes used interchangeably. In general, the term 'peace operations' covers both peacekeeping and peace-enforcement operations conducted by international organizations, regional organizations or coalitions of States acting on behalf of the international community pursuant to a UN Security Council resolution adopted under Chapters VI, VII or VIII of the 1945 UN Charter. The considerations contained in this section would, in principle, also be applicable to multinational forces operating outside a mandate assigned by the international community, for instance when military operations are conducted on the basis of self-defence.

[87] For a discussion, see the commentary on common Article 3, paras 445–447.

multinational forces fall within the province of *jus ad bellum* and have no effect on the applicability of humanitarian law to their actions.

279 Some have argued, however, that there is or should be a higher threshold of violence for the applicability of humanitarian law governing international armed conflict when multinational forces under UN command and control are involved in military action on the basis of a UN Security Council mandate.[88] This view does not challenge the applicability of humanitarian law as a whole, but suggests that the conditions triggering its applicability are different when multinational forces under UN command and control are involved.[89] Less frequently, it has also been contended that when multinational forces were operating under a UN mandate, but not under UN command and control, the States contributing troops to the operation were not involved in an international armed conflict insofar as the military operations had the sole aim of protecting civilians and re-establishing international peace and security.[90]

280 However, nothing in the Geneva Conventions implies that conditions for their applicability differ when multinational forces – including those under UN command and control – are involved in an armed conflict. Under existing law, the criteria for determining the existence of an armed conflict involving multinational forces are the same as those used for more 'classic' forms of armed conflict.[91] Requiring a higher intensity of hostilities to reach the threshold of armed conflict involving multinational armed forces is neither supported by general practice nor confirmed by *opinio juris*.[92] Therefore, a determination as to whether multinational forces are involved in an international or non-international armed conflict, or not involved in an armed conflict at all, should conform to the usual interpretation of common Articles 2 and 3, also when acting on the basis of a mandate of the UN Security Council.[93]

[88] See Shraga, 2008; Berman, p. 41; Christopher Greenwood, 'International Humanitarian Law and United Nations Military Operations', *Yearbook of International Humanitarian Law*, Vol. 1, 1998, pp. 3–34, at 24; and International Law Association, Committee on the Use of Force, *Final Report on the Meaning of Armed Conflict in International Law*, The Hague Conference, 2010, p. 17. For an overview of the discussion, see Ferraro, 2013, pp. 580–583.

[89] Shraga, 2009, pp. 359–360.

[90] This argument was raised in the context of 'Operation Unified Protector', conducted in 2011 by NATO forces in Libya. Engdahl, p. 259, referring to a statement of the Norwegian prime minister according to which Norway could not be considered a Party to the international armed conflict while participating in the NATO operations in Libya because it was executing a mission assigned by the UN.

[91] ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Report prepared for the 32nd International Conference of the Red Cross and Red Crescent, Geneva, 2015, pp. 21–23. Kolb/Porretto/Vité, pp. 180–181; see also references in fn. 93. But see Marten Zwanenburg, *Accountability of Peace Support Operations*, Martinus Nijhoff Publishers, Leiden, 2005, p. 207.

[92] Ferraro, 2013, p. 582.

[93] Ola Engdahl, 'The Status of Peace Operation Personnel under International Humanitarian Law', *Yearbook of International Humanitarian Law*, Vol. 11, 2008, pp. 109–138, at 118; Garth J. Cartledge, 'Legal Restraints on Military Personnel Deployed on Peacekeeping Operations', in Helen Durham and Timothy L.H. McCormack (eds), *The Changing Face of Conflict and the*

281 Once multinational forces have become involved in an international armed conflict, it is important to identify who among the participants in a multinational operation should be considered a Party to the conflict. Depending on the circumstances, the Party or Parties to the conflict may be the troop-contributing countries, the international organization under whose command and control the multinational forces operate, or both.

282 When multinational operations are conducted by States not subject to the command and control of an international organization, the individual States participating in military operations against another State(s) should be considered as Parties to the international armed conflict.

283 The situation is more complex when it comes to multinational operations conducted under the command and control of an international organization. International organizations involved in such operations generally share one characteristic, which is that they do not have armed forces of their own. In order to carry out such operations, they must rely on Member States to place armed forces at their disposal. States that place troops at the disposal of an international organization always retain some form of authority and control over their own armed forces, such that, even when a State's armed forces operate on behalf of an international organization, they simultaneously act as an organ of their State. Therefore, the dual status of armed forces involved in multinational operations conducted under the command and control of an international organization – as organs of both the troop-contributing country and the international organization – complicates the determination of who should be considered a Party to the armed conflict.

284 One way to determine which is the Party to a conflict in such situations may be to identify the entity to which the conduct may be attributed according to the rules of international law.[94] Under the rules on attribution of conduct developed for the responsibility of international organizations and States, the notion of control over the conduct in question is key.[95] Thus, if this approach were to be adopted, it would mean that determining which entity is a Party – or which entities are Parties – to an armed conflict requires an examination of the level of control the international organization exercises over the troops put at its disposal.

Efficacy of International Humanitarian Law, Martinus Nijhoff Publishers, The Hague, 1999, pp. 125–130.

[94] Zwanenburg, 2012b, pp. 23–28.

[95] See Draft Articles on the Responsibility of International Organizations (2011), paras 77–88. See also Tom Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers', *Harvard International Law Journal*, Vol. 51, No. 1, 2010 pp. 113–192, and Christopher Leck, 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct', *Melbourne Journal of International Law*, Vol. 10, No. 1, 2009, pp. 346–364. For States, see also paras 298–306 of this commentary.

285 This may be a difficult enterprise as there is no 'one-size-fits-all' approach concerning the command and control arrangements and the corresponding levels of authority in force in multinational operations. Command and control arrangements vary from one operation to another and from one international organization to another.[96] In this regard, a case-by-case approach is required in order to determine which entity has effective or overall control over the military operations and therefore who should be considered a Party to the international armed conflict.[97] In some cases, both the international organization and some or all of the States contributing troops to the operation may be Parties to the armed conflict.[98]

ii. International armed conflict triggered by cyber operations

286 Technological advances, in particular the exponential increase in States' cyber capabilities and their potential impact on the civilian population and infrastructure as well as on the military capabilities of an enemy State, pose important questions in relation to the applicability of humanitarian law. More specifically, it is important to determine whether cyber operations can bring an international armed conflict into existence.

287 When cyber activities are carried out by one State against another in conjunction with and in support of more classic military operations, there is no doubt that such a situation would amount to an international armed conflict.[99] However, the situation appears less clear when cyber operations are the only means by which hostile actions are undertaken by a State. The question is even more complex when such operations remain isolated acts. Could they be

[96] Terry D. Gill, 'Legal Aspects of the Transfer of Authority in UN Peace Operations', *Netherlands Yearbook of International Law*, Vol. 42, 2011, pp. 37–68; Blaise Cathcart, 'Command and Control in Military Operations', in Terry D. Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations*, 2nd edition, Oxford University Press, 2015, pp. 259–268.

[97] For a discussion of these issues, see Engdahl, pp. 233–271; Zwanenburg, 2012b, pp. 23–28; and Ferraro, 2013, pp. 588–595. It may happen that troop-contributing countries are so closely associated with the command and control structure of the international organization that it is almost impossible to discern whether it is the international organization itself or the troop-contributing countries that have overall or effective control over military operations. In such situations, operations should usually be attributed to the international organization and the troop-contributing countries simultaneously. The logical legal consequence of this in terms of humanitarian law is that both should be considered Parties to the armed conflict; see ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Report prepared for the 32nd International Conference of the Red Cross and Red Crescent, Geneva, 2015, pp. 23–24.

[98] It has come to be accepted that such organizations are bound by customary international law. See ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949, p. 179; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 1980, para. 37; and *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (WHO)*, Advisory Opinion, 1996, para. 25. See also the commentary on Article 3, section D.1.c.

[99] See Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations (2017), Rule 82.

considered as a 'resort to armed force' between States as a constitutive element of the notion of armed conflict?

288 It is generally accepted that cyber operations having similar effects to classic kinetic operations would amount to an international armed conflict.[100] Indeed, if these operations result in the destruction of civilian or military assets or cause the death or injury of soldiers or civilians, there would be no reason to treat the situation differently from equivalent attacks conducted through more traditional means and methods of warfare.

289 However, cyber operations do not always and necessarily have such effects. Without physically destroying or damaging military or civilian infrastructure, cyber attacks might also disrupt their operation. Could these still be considered as a resort to armed force under Article 2(1)? Would the low intensity approach still be appropriate for hostile actions carried out only through cyber operations? Would the threshold of harm tolerated by States affected by cyber operations be different depending on the military or civilian nature of the 'targeted' object? For the time being, these questions are left open and the law is uncertain on the subject. Therefore, it remains to be seen if and under what conditions States will treat such cyber operations as armed force amounting to armed conflict under humanitarian law in future operations.[101]

iii. The relevance of consent to the existence of an international armed conflict

290 Contemporary armed conflicts show that increasingly States carry out military operations in the territory of another State. These interventions are often directed against non-State armed groups and form part of the military support provided to the local government within the framework of a pre-existing non-international armed conflict. In other cases, the intervention against such groups might be part of a non-international armed conflict taking place on the territory of another State and to which that State is not party. Third States may also intervene in a pre-existing non-international armed conflict by supporting and even exerting some form of control over the armed groups fighting the territorial government.[102]

291 All these forms of extraterritorial intervention pose the question of the influence of the third State's military actions on the classification of the

[100] See Schmitt, 2012a, p. 251; Knut Dörmann, *Applicability of the Additional Protocols to Computer Network Attacks*, ICRC, 2004, p. 3; Heather Harrison Dinniss, *Cyber Warfare and the Laws of War*, Cambridge University Press, 2012, p. 131; Nils Melzer, *Cyberwarfare and International Law*, UNIDIR Resources Paper, 2011, p. 24; and Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations (2017), Rule 82, para. 16. See, however, *Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security*, UN Doc. A/68/98, 24 June 2013, para. 16.

[101] Cordula Droege, 'Get off my cloud: cyber warfare, international humanitarian law, and the protection of civilians', *International Review of the Red Cross*, Vol. 94, No. 886, June 2012, pp. 545–549.

[102] For a more detailed review of these different scenarios, see Vité, pp. 69–94.

situation for the purposes of humanitarian law. In some cases, these situations may constitute an international armed conflict in the sense of Article 2(1).

292 First of all, it should be specified that not every use of armed force in the territory of another State, including its territorial waters and airspace, creates a belligerent relationship with the territorial State and would therefore not necessarily be classified as an international armed conflict. Indeed, a State might consent to the use of force in its own territory by a foreign State; it might even call for such an intervention, for instance to respond to the threat emanating from a non-State armed group fighting the government or operating against other States from its territory. In such cases, the existence of consent would clearly rule out the classification of the intervention as an international armed conflict, provided the intervention stays within the limits posited by the consenting State and that the consent is not withdrawn.

293 The presence or absence of consent is essential for delineating the applicable legal framework between the two States as it affects the determination of the international or non-international character of the armed conflict involving those States.[103] Should the third State's intervention be carried out without the consent of the territorial State, it would amount to an international armed conflict between the intervening State and the territorial State.[104]

– Armed intervention in the territory of another State

294 In some cases, the intervening State may claim that the violence is not directed against the government or the State's infrastructure but, for instance, only at another Party it is fighting within the framework of a transnational, cross-border or spillover non-international armed conflict. Even in such cases, however, that intervention constitutes an unconsented-to armed intrusion into the territorial State's sphere of sovereignty, amounting to an international armed conflict within the meaning of common Article 2(1).[105] This position was implicitly confirmed by the International Court of Justice in *Armed Activities on the Territory of the Congo*, in which the Court applied the law governing international armed conflict to the military actions undertaken by Uganda in the Democratic Republic of the Congo (DRC) outside the parts of the DRC it occupied. According to the International Court of Justice, the conflict was international in nature even though Uganda claimed to have troops in the

[103] Akande, p. 74: 'Given that a use of force by one State on the territory of another, without the consent of the latter, is a use of force by the foreign State against the territorial State, a situation of armed conflict between the two automatically arises.'

[104] This is without prejudice to the question of any effect consent may have in regard to the *jus ad bellum*.

[105] Akande, pp. 74–75. For a discussion of the question of non-international armed conflict not of a purely internal character, see the commentary on Article 3, section C.3.c.

DRC primarily to fight non-State armed groups and not the DRC armed forces.[106] This does not exclude the existence of a parallel non-international armed conflict between the intervening State and the armed group.

295 Some consider that in situations in which a State attacks exclusively members of a non-State armed group or its property on the territory of another State, no parallel international armed conflict arises between the territorial State and the State fighting the armed group.[107] While that view is consequential in some respects, it is useful to recall that the population and public property of the territorial State may also be present in areas where the armed group is present and some group members may also be residents or citizens of the territorial State, such that attacks against the armed group will concomitantly affect the local population and the State's infrastructure. For these reasons and others, it better corresponds to the factual reality to conclude that an international armed conflict arises between the territorial State and the intervening State when force is used on the former's territory without its consent.

296 Where a territorial State consents to the actions of an intervening State, thereby removing the existence of a parallel international armed conflict, the consent given must have been previously expressed or established (explicitly or tacitly).[108] It must be valid, i.e. given by an authority authorized to do so on behalf of the State, and given without any coercion from the intervening State.[109] However, the existence of such consent might be very difficult to establish for a number of reasons. States often do not publicize their consensual agreements. Moreover, the intervention of a third State might not give rise to any protest from the territorial State, may prompt contradictory statements by its authorities, or may trigger symbolic protests aimed at satisfying its own constituency. If the absence of protest is a strong indicator of the existence of – at least – tacit consent, the two other situations remain very complex and

[106] ICJ, *Armed Activities on the Territory of the Congo case*, Judgment, 2005, paras 108, 146 and 208ff. For a similar position, see UN Commission of Inquiry on Lebanon, *Report of the Commission of Enquiry on Lebanon pursuant to Human Rights Council resolution S-2/1*, UN Doc. A/HRC/3/2, 23 November 2006, paras 50–62, recognizing that an international armed conflict took place in 2006 between Israel and Lebanon even if the hostilities only involved Hezbollah and Israeli armed forces.

[107] See Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, Oxford University Press, 2010, pp. 92–134; Carron, pp. 409–432; Andreas Paulus and Mindia Vashakmadze, 'Asymmetrical war and the notion of armed conflict – a tentative conceptualization', *International Review of the Red* Cross, Vol. 91, No. 873, March 2009, pp. 95–125, at 111–119; and Claus Kreß, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts', *Journal of Conflict and Security Law*, Vol. 15, No. 2, 2010, pp. 245–274, at 255–277.

[108] ILC, 'Report of the 53rd session', *Yearbook of the International Law Commission*, Vol. II, Part Two, 2001, p. 73. See also Antonio Cassese, *International Law*, 2nd edition, Oxford University Press, 2005, pp. 370–371.

[109] Draft Articles on State Responsibility (2001), commentary on Article 20, p. 73. For a more detailed discussion of the notion of consent in the context of armed conflict, see ICRC, *Occupation and Other Forms of Administration of Foreign Territory*, pp. 20–23.

sensitive. However, if the territorial State has explicitly protested against the intervention and this protest has been made by authorities that are entitled to give or withdraw the consent, it should be presumed that the consent did not exist in the first place or has been withdrawn, triggering the application of humanitarian law to the relationship between the territorial State and the intervening State.

– Presence of armed forces in another State providing support to a non-State armed group

297 States sometimes intervene via their armed forces on the territory of another State in support of one or more non-State armed groups in their fight against the local government. The nature of such support may vary but has frequently taken the form of direct involvement of that State's armed forces alongside the armed group(s). In such a situation – and besides the fact that a non-international armed conflict exists between the local government and the armed group(s) – the nature of the armed confrontation between the intervening State and the territorial State is international. Indeed, the third State forcibly intervenes in the territory of another State through military means used against the territorial State. All the conditions for the existence of an armed conflict under Article 2(1) are met and the Geneva Conventions in their entirety will govern the belligerent relationship between the intervening State and the territorial State (while simultaneously the law applicable to non-international armed conflict will govern the conflict between the territorial State and the armed group(s)).[110]

iv. State control over a non-State armed group and international armed conflict

298 In some situations, the support provided by the outside State to the non-State armed group(s) is tantamount to a form of control. Such control may be exercised in addition to or in lieu of the physical presence of a State's armed forces in the territory of the other State. This scenario has been addressed by international tribunals, which have accepted that a situation takes on an international dimension when another State intervenes in a pre-existing non-international armed conflict through the exercise of a particular level of control over one or more of the armed groups that were party to the conflict.

299 In such a situation, there will no longer be parallel non-international and international armed conflicts, but only an international armed conflict between the intervening State and the territorial State, even though one of

[110] See Vité, pp. 85–87. Some consider that where a foreign State has intervened in an ongoing non-international armed conflict, the entire conflict becomes international, but this view has not been accepted by practice or in case law. See e.g. David, paras 1.111–1.124. See also George H. Aldrich, 'The Laws of War on Land', *American Journal of International Law*, Vol. 94, No. 1, 2000, pp. 42–63, especially at 62–63.

them makes use of a non-State armed group.[111] This was the case in the 1990s in the conflict in the former Yugoslavia, where, according to the ICTY's findings, the Governments of Croatia and Serbia exercised overall control over certain armed groups fighting in the non-international armed conflicts in Bosnia and Herzegovina and in Croatia. This kind of control highlights the relationship of subordination between the armed group(s) and the intervening State, which, depending on its degree, might turn a pre-existing non-international armed conflict into a purely international one.

300 In order to determine the existence of a relationship of subordination, one needs to prove that the armed group is indeed acting on behalf of the intervening State. This means that the actions of the armed group need to be linked to the intervening State so as to be legally considered as actions of the latter. Because there is no specific test under humanitarian law for determining whether an armed group's forces 'belong' to a third State,[112] one has to look to general rules of international law, which help to determine when and under which conditions private persons (including members of non-State armed groups) can be considered to act on behalf of a third State. International law regulating State responsibility suggests some suitable solutions.

301 As under international law regulating State responsibility, the issue at stake for the classification of the conflict is whether the actions carried out by individuals or a group of individuals can be linked to the bearer of the international obligations (i.e. the intervening State). This means that the test that is used to identify the relationship between a group of individuals and a State for the purposes of the classification of a conflict under humanitarian law should be the same as the one used to attribute an action carried out by private individuals (or a group of private individuals) to a State under international law of State responsibility.[113] The question of 'attribution' plays a major role in defining an armed conflict as international since, by virtue of this operation, the actions of the armed group can be considered as actions of the intervening State[114] and the relationship of subordination can be established.

[111] However, it can be envisaged that an international armed conflict is triggered in the absence of a prior non-international armed conflict if a State engages in military operations against another State using an armed group over which it has the requisite control. In such a situation, the armed clashes would immediately and solely be governed by the law of international armed conflict.

[112] Only Article 4A(2) of the Third Convention refers to such a relationship of subordination but describes it in a factual way and does not necessarily require the exercise of control over the group. For a further discussion, see the commentary on Article 4, section E.1.

[113] Zwanenburg, 2012b, p. 26. See also Marina Spinedi, 'On the Non-Attribution of the Bosnian Serbs' Conduct to Serbia', *Journal of International Criminal Justice*, Vol. 5, No. 4, 2007, pp. 829–838, at 832–833. Note that the ICJ appears to indicate that the tests need not be the same for the attribution of conduct and the classification of a conflict; see ICJ, *Application of the Genocide Convention case*, Merits, Judgment, 2007, paras 404–405.

[114] ICTY, *Tadić* Appeal Judgment, 1999, para. 104.

302 The level of control by the foreign State over the non-State armed group necessary to render an armed conflict international in such a way is debated.[115] The International Law Commission[116] and some international tribunals (ICC, ICTY),[117] as well as academic writers,[118] have recognized that the notion of control is central to the question of attribution of the actions of a non-State armed group to a State. However, the international tribunals seized of the issue initially interpreted the notion of control in a non-uniform way. Subsequently, the different tests suggested by the courts, notably the ones on effective control and overall control, have fostered a doctrinal debate. Without delving too much into the details of the legal analysis of the notion of control in identifying the humanitarian law rules applicable to a given situation, it is necessary to emphasize that international jurisprudence – and doctrine – has long hesitated between the more restrictive options of complete dependence and control or 'effective control' adopted by the International Court of Justice for the purposes of State responsibility in decisions in 2007[119] and 1986[120] and the broader notion of 'overall control' suggested by the ICTY.[121] The notion of effective control requires that the non-State armed group that is subjected to control be not only equipped and/or financed and its actions supervised by the intervening Power, but also receives specific instructions from that Power, or that the intervening Power controls the specific operation in which the violation occurs.[122] Conversely, in 1999 in *Tadić* the ICTY affirmed:

> In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable

[115] For an overview of the debate, see e.g. Akande, pp. 57–62 and 63–64.
[116] Draft Articles on State Responsibility (2001), commentary on Article 8, pp. 110–112.
[117] ICC, *Lubanga* Decision on the Confirmation of the Charges, 2007, and Trial Judgment, 2012, para. 541; ICTY, *Tadić* Appeal Judgment, 1999. The European Court of Human Rights has been asked by the Parties in cases before it to apply the attribution test to find jurisdiction; in a number of judgments the Court asserts that it uses a distinct test. See e.g. *Chiragov and others* v. *Armenia*, Judgment, 2015, para. 169; see also Partly Dissenting Opinion of Judge Ziemele, paras 6–12, and Dissenting Opinion of Judge Gyuluman, paras 49–95. See also *Al-Skeini and others* v. *UK*, Judgment, 2011, paras 130–142; *Catan and others* v. *Moldova and Russia*, Grand Chamber, Judgment, 2012, paras 106–107; *Jaloud* v. *The Netherlands*, Judgment, 2014; *Loizidou* v. *Turkey*, Judgment, 1996; and *Cyprus* v. *Turkey*, Judgment, 2001.
[118] Milanovic, 2006, pp. 553–604; Cassese, pp. 649–668; Talmon, p. 496.
[119] ICJ, *Application of the Genocide Convention case*, Merits, Judgment, 2007, paras 392–393.
[120] ICJ, *Military and Paramilitary Activities in and against Nicaragua case*, Merits, Judgment, 1986, para. 115.
[121] This hesitation is reflected in the ILC's commentaries on the 2001 Draft Articles on State Responsibility. The ILC, while discussing the notion of control in the framework of the commentary on Article 8, does not choose between effective control and overall control, and simply states that '[i]n any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it' (p. 48).
[122] ICJ, *Military and Paramilitary Activities in and against Nicaragua case*, Merits, Judgment, 1986, para. 115.

for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.[123]

The ICTY has therefore rejected the application of the effective control criterion for the purposes of classifying an armed conflict in the case of a military or paramilitary group and opted for the condition of 'overall control'.[124]

303 While the International Court of Justice does not accept the use of the 'overall control' test as articulated by the ICTY for the purpose of attribution of conduct to a State, the most recent decisions of international tribunals display a clear tendency to apply the overall control test for the purposes of classifying a conflict. Of course, the ICTY was a precursor in this context since it was under its auspices that the concept of overall control was first developed.[125] This approach was then followed by the ICC in the *Lubanga* case. In 2007, the ICC Pre-Trial Chamber stated that 'where a State *does not intervene directly* on the territory of another State through its own troops, the overall control test will be used to determine whether armed forces are acting on behalf of the first State'.[126] In its 2012 judgment in the same case, the Trial Chamber agreed with this analysis.[127] Lastly, the International Court of Justice

[123] ICTY, *Tadić* Appeal Judgment, 1999, para. 131. In this sense, the notion of overall control does not refer simply to the monitoring or controlling activity but also requires the exercise of a form of authority over another entity. It is clear that the notion of 'authority' to which reference is made is more general and global than the notion of 'power to give instructions', and the former is therefore much more similar to a 'direction and coordination' power.

[124] However, the ICTY has also acknowledged that where the controlling State is not the territorial State, 'more extensive and compelling evidence is required to show that the state is genuinely in control of the units and groups', meaning that the State's involvement in the planning and coordination of military operations might be more difficult to demonstrate (*Tadić* Appeal Judgment, 1999, paras 138–140). The Tribunal also noted that a different approach is taken when individuals or groups are *not* organized into military structures (*ibid.* paras 132–137).

[125] The decision of the ICTY Appeals Chamber in the *Tadić* case has often captured the attention of commentators, but in reality the concept of overall control was already developed beforehand in the *Aleksovski* Trial Judgment in 1999. Indeed, in that judgment, Judges Vohrah and Nieto-Navia concluded in their joint opinions on the applicability of Article 2 of the 1993 ICTY Statute, para. 27:

> [T]he Prosecution failed to discharge its burden of proving that, during the time-period and in the place of the indictment, the HVO [Croatian Defence Council] was in fact acting under the overall control of the HV [Army of the Republic of Croatia] in carrying out the armed conflict against Bosnia and Herzegovina. The majority of the Trial Chamber finds that the HVO was not a *de facto* agent of Croatia … Therefore, the Prosecution has failed to establish the internationality of the conflict.

[126] ICC, *Lubanga* Decision on the Confirmation of the Charges, 2007, para. 211.

[127] ICC, *Lubanga* Trial Judgment, 2012, para. 541:

> As regards the necessary degree of control of another State over an armed group acting on its behalf, the Trial Chamber has concluded that the 'overall control' test is the correct approach. This will determine whether an armed conflict not of an international character may have become internationalised due to the involvement of armed forces acting on behalf of another State.

See also *Bemba* Trial Judgment, 2016, para. 130.

in 2007 expressly indicated that the notion of overall control could be used to determine the legal classification of a situation under humanitarian law.[128]

304 In order to classify a situation under humanitarian law when there is a close relationship, if not a relationship of subordination, between a non-State armed group and a third State, the overall control test is appropriate because the notion of overall control better reflects the real relationship between the armed group and the third State, including for the purpose of attribution. It implies that the armed group may be subordinate to the State even if there are no specific instructions given for every act of belligerency. Additionally, recourse to the overall control test enables the assessment of the level of control over the *de facto* entity or non-State armed group as a whole, and thus allows for the attribution of several actions to the third State.[129] Relying on the effective control test, on the other hand, might require reclassifying the conflict with every operation, which would be unworkable. Furthermore, the test that is used must avoid a situation where some acts are governed by the law of international armed conflict but cannot be attributed to a State.

305 This position is not at present uniformly accepted. The International Court of Justice conceives that the overall control test can be used to classify conflicts whereas the effective control standard remains the test for attribution of conduct to a State, without clarifying how the two tests could work together.[130] A minority of academic commentators have questioned the use of the overall control test.[131]

306 In the view of the ICRC, the consequences of the notion of overall control will be decisive insofar as the non-State armed group then becomes subordinated to the intervening State. The members of the armed group become the equivalent of 'agents' of the intervening State under international law. This means that the intervening State becomes a Party to the existing conflict in

[128] ICJ, *Application of the Genocide Convention case*, Merits, Judgment, 2007, para. 404. The wording used by the ICJ is: 'Insofar as the "overall control" test is employed to determine whether or not an armed conflict is international . . . , it may well be that the test is applicable and suitable.'

[129] In opposition, effective control linked to every single operation is almost impossible to prove because it requires a level of proof that will unlikely be reached. *A fortiori*, the attribution test based on 'total control and dependence' used by the ICJ in 2007 in the *Application of the Genocide Convention case* and in 1986 in *Military and Paramilitary Activities in and against Nicaragua case* in order to determine the State's responsibility for any internationally wrongful act makes the test for attribution even stricter. See Ascencio, pp. 290–292, and Jörn Griebel and Milan Plücken, 'New Developments regarding the Rules of Attribution? The International Court of Justice's Decision in *Bosnia* v. *Serbia*', *Leiden Journal of International Law*, Vol. 21, No. 3, 2008, pp. 601–622.

[130] ICJ, *Application of the Genocide Convention case*, Merits, Judgment, 2007, paras 404–407.

[131] For an analysis of these views, see e.g. Milanovic, 2006, pp. 553–604, and 2007, pp. 669–694; Talmon, pp. 493–517; Akande, pp. 57–62; Katherine Del Mar, 'The Requirement of "Belonging" under International Humanitarian Law', *European Journal of International Law*, Vol. 21, No. 1, 2010, pp. 105–124; and Theodor Meron, 'Classification of Armed Conflict in the former Yugoslavia: *Nicaragua*'s Fallout', *American Journal of International Law*, Vol. 92, No. 2, April 1998, pp. 236–243.

lieu of the armed group and that the conflict has become entirely international in nature. The notion of overall control might prevent the intervening Power from hiding behind the proxy's veil in order to avoid its obligations and international responsibilities under humanitarian law. It also makes it possible to challenge the third State's claim that the actions were in fact those of actors who could not be considered as officials or persons acting on its behalf and therefore that it could not itself be considered as a Party to the conflict.[132]

c. The end of international armed conflict

307 Assessing the end of an armed conflict in the sense of Article 2(1) may be a very difficult enterprise. This is mainly due to the silence of the Geneva Conventions on this question but also to State practice, which indicates that States resort less and less to the conclusion of peace treaties.[133]

308 According to the traditional doctrinal approach, a war is ended by the conclusion of a peace treaty or by any other clear indication (e.g. a declaration) on the part of the belligerents that they regard the state of war to be terminated. This position supports the argument that once a state of war (in the traditional legal sense) has come into being, the fact that active hostilities and military operations cease 'is not in itself sufficient to terminate the state of war'.[134] Accordingly, any other agreements, be they in the form of a ceasefire or a truce, a cessation of hostilities or an armistice, were considered as temporary and as suspending, not terminating, hostilities.[135] The common characteristic of these agreements is that they do not alter the fact that there is still an international armed conflict under way and, in general, fall short of peace. Nevertheless, all of them are meant to temporarily suspend hostilities and can be seen as a step towards a definitive termination of the armed conflict.[136]

309 Nowadays, international armed conflicts rarely end with the conclusion of a peace treaty but are often characterized by unstable ceasefires, a slow and progressive decrease in intensity, or the intervention of peacekeepers. In some cases, there remains a strong possibility that hostilities will resume.[137] With this trend, the distinction between agreements aimed at suspending hostilities and peace treaties has become blurred. In any case, the determination that an

[132] Cassese, p. 656. See also ICTY, *Tadić* Appeal Judgment, 1999, para. 117.
[133] The Conventions do, however, contain a number of provisions related to the duration of their application. See e.g. First Convention, Article 5, Third Convention, Article 5, and Fourth Convention, Article 6; see also Additional Protocol I, Article 3.
[134] Kleffner, p. 62; Dinstein, 2004, pp. 889–890.
[135] Dinstein, 2004, pp. 889–890.
[136] Shields Delessert, p. 97. In terms of substance, it is probably the armistice agreement that goes the furthest by implicitly including the intention of the belligerents to begin making preparations for the termination of a war; see Kleffner, 2013, pp. 65–66.
[137] Sassòli/Bouvier/Quintin, pp. 134–135.

international armed conflict has ended is based not on the existence of a peace agreement, but rather on an appreciation of the facts on the ground.

310 In this regard, evidence that there has been a 'general close of military operations' is the only objective criterion to determine that an international armed conflict has ended in a general, definitive and effective way.[138] Hostilities must end with a degree of stability and permanence for the international armed conflict to be considered terminated.[139] The ICTY confirmed in *Gotovina* that the general close of military operations constituted the crux of the determination of the end of an international armed conflict:[140]

> Once the law of armed conflict has become applicable, one should not lightly conclude that its applicability ceases. Otherwise, the participants in an armed conflict may find themselves in a revolving door between applicability and non-applicability, leading to a considerable degree of legal uncertainty and confusion. The Trial Chamber will therefore consider whether at any point during the Indictment period the international armed conflict had found a sufficiently general, definitive and effective termination so as to end the applicability of the law of armed conflict. It will consider in particular whether there was a general close of military operations.[141]

311 This notion of general close of military operations was interpreted in the 1958 Commentary on the Fourth Convention as the 'final end of all fighting between all those concerned'.[142] Later, in the 1987 Commentary on Additional Protocol I, it was argued that the expression 'general close of military operations' was something more than the mere cessation of active hostilities since military operations of a belligerent nature do not necessarily imply armed violence and can continue despite the absence of hostilities.[143] The general close of military operations would include not only the end of active hostilities but also the end of military movements of a bellicose nature, including those that reform, reorganize or reconstitute, so that the likelihood of the resumption of hostilities can reasonably be discarded.

312 Since 'military operations' are defined as 'the movements, manoeuvres and actions of any sort, carried out by the armed forces with a view to combat',[144] the fact of redeploying troops along the border to build up military capacity or mobilizing or deploying troops for defensive or offensive purposes should be

[138] The argument is further supported by Article 6(2) of the Fourth Convention, which states that the Convention ceases to apply 'after the general close of military operations'. See also Greenwood, 2008, p. 72: the 'cessation of active hostilities should be enough to terminate the armed conflict'.
[139] Milanovic, 2013, p. 88.
[140] ICTY, *Gotovina* Trial Judgment, 2011, para. 1697.
[141] *Ibid.* para. 1694.
[142] Pictet (ed.), *Commentary on the Fourth Geneva Convention*, ICRC, 1958, p. 62.
[143] Sandoz/Swinarski/Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, 1987, para. 153.
[144] *Ibid.* para. 152.

regarded as military measures with a view to combat. Even in the absence of active hostilities, such military operations having a continuing nexus with the international armed conflict will justify maintaining the classification of the situation as an international armed conflict. The overall picture emanating from this situation is one that objectively speaks of an armed conflict that has not ended in a general, definitive and effective way.

313 Thus, when belligerent States are no longer involved in hostilities but, for instance, maintain troops on alert, mobilize reservists or undertake military movements on their borders, the absence of ongoing hostilities will generally be a lull or a temporary suspension of armed clashes rather than a stable ceasefire or armistice that can be interpreted as the first stage towards an impending state of peace. Military operations short of active hostilities pitting one belligerent against another would still justify *per se* the continued existence of an international armed conflict provided one can reasonably consider that the hostilities between the opposing States are likely to resume in the near future owing to their ongoing military movements. In such circumstances, it cannot be concluded that there has been a general close of military operations.

314 In a similar vein to the 'general close of military operations' test, it has been suggested that the assessment of the end of an armed conflict revolves around one basic general principle, namely that 'the application of IHL will cease once the conditions that triggered its application in the first place no longer exist'.[145] The application of this principle would mean that armed conflict within the meaning of Article 2(1) would end when the belligerent States are no longer involved in armed confrontation. This would be clear in situations where, for instance, the armed conflict was triggered by and consisted solely of the mere capture of soldiers or sporadic and temporary military incursions in the enemy State's territory. In these cases, the release of the soldiers or the cessation of the military incursions would suffice to put an end to the situation of armed conflict. However, the determination of the end of an armed conflict might be more complex in contexts where the armed conflict resulted from a more classic armed confrontation, i.e. open hostilities between two or more States' armed forces. The general principle thus articulated should thus be read in line with the factors providing evidence of a general close of military operations as indicated above.

315 The consideration that armed conflict is neither a technical nor a legal concept but rather a recognition of the fact of hostilities supports the conclusion that agreements less formal than peace treaties can indicate the end of an armed conflict. Any of the agreements mentioned above that fall short of peace treaties might nonetheless have the effect of permanently terminating hostilities. That said, a suspension of hostilities, a ceasefire, an armistice or even a

[145] Milanovic, 2013, pp. 86–87. However, this author also specified rightly that this general principle might be subject to exceptions.

peace treaty does not constitute the end of an international armed conflict if the facts on the ground show otherwise.[146] Rather, an agreement is only a piece of evidence that, coupled with other elements, might reveal a certain intention of the belligerents to end the armed conflict definitively.[147] The 'labelling' of an agreement is therefore irrelevant; it is rather the *de facto* situation that results from an agreement that defines its real meaning and its ability objectively to put an end to the armed conflict.[148] Therefore, ceasefire agreements or any such instruments leading to or coinciding with a *de facto* general close of military operations might indicate the point at which the armed conflict will be considered to have ended.

316 Accordingly, the end of an armed conflict, like its beginning, must be determined on the basis of factual and objective criteria.[149] What counts is that the armed confrontation between the belligerent States has ceased to such an extent that the situation can reasonably be interpreted as a general close of military operations.

317 The end of an armed conflict does not mean that humanitarian law will cease to apply entirely. Some provisions continue to apply after the end of armed conflict. Such is provided, for example, by Article 5 of the First Convention, Article 5(1) of the Third Convention, Article 6(4) of the Fourth Convention and Article 3(b) of Additional Protocol I, which provides:

> [T]he application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation, except, in either circumstance, for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release, repatriation or re-establishment.

[146] In this respect, the ICTY, in *Boškoski and Tarčulovski* Trial Judgment, 2008, para. 293, rightly stated:

> The temporal applicability of the laws and customs of war was described by the Appeals Chamber in the case of internal armed conflicts as lasting until a peaceful settlement is achieved. This finding is not to be understood as limiting the jurisdiction of the Tribunal to crimes committed until a peace agreement between the parties was achieved; rather, if armed violence continues even after such agreement is reached, an armed conflict may still exist and the laws and customs of war remain applicable.

While that case dealt with non-international armed conflict, it is submitted here that this view can be perfectly transposed to international armed conflict as it exactly reflects the rationale of Article 2(1) and its objective to assess the applicability of humanitarian law solely on the basis of the prevailing facts. See also Venturini, p. 57.

[147] See Kleffner, 2013, p. 65.

[148] Shields Delessert, pp. 97–100.

[149] With its decision in *Gotovina*, the ICTY appears also to have identified a more fact-based test than the one postulated in *Tadić* 'until a general conclusion of peace is reached', which also risked introducing an undesirable degree of formalism.

E. Paragraph 2: Applicability of the Conventions in case of occupation

1. Occupation meeting with no armed resistance

318 Article 2(2) is the first provision of the Geneva Conventions expressly referring to the notion of occupation. However, occupation is already implied by common Article 2(1), which covers occupation occurring during or as a result of hostilities in the context of declared war or armed conflict.[150] However, for editorial reasons, all issues related to occupation are addressed in this section of the commentary.

319 Article 2(2) was inserted to ensure that the law of occupation applies even when the occupation is not resisted. It aims to address cases of occupation established without hostilities and fills a gap left by Article 2(1). The historical origin of Article 2(2) is based on the experience of the Second World War and in particular the occupation of Denmark by Nazi Germany in 1940. On that occasion, Denmark decided not to resist the occupation owing to the overwhelming superiority of the German troops. In addition, prior to the adoption of the 1949 Geneva Conventions, the International Military Tribunal for Germany considered Bohemia and Moravia as occupied territories even though they fell under Germany's effective control without any armed resistance.[151] Article 2(2) thus introduced in treaty law a scenario that was already acknowledged by academics and tribunals and was not a legal novelty when adopted.[152]

320 Article 2(2) is thus complementary to Article 2(1) and ensures that the law of occupation applies to all types of occupation.

321 The fact that an occupation does not meet with armed resistance does not preclude it from being hostile. The hostile nature of an occupation derives from the unconsented-to invasion or presence of a State's armed forces in the territory of another State.[153] Military occupation is by definition an asymmetric relationship: the existence of an occupation implies that foreign forces are imposing their authority over the local government by military or other coercive means. The imposition of such authority by military means does not necessitate open hostilities. It can be obtained by the mere show of force. A real or perceived military superiority might induce the local government to refrain from opposing militarily the deployment of foreign troops on its

[150] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 331–339. See also Pictet (ed.) *Commentary on the Fourth Geneva Convention*, ICRC, 1958, pp. 18–22.

[151] International Military Tribunal for Germany, *Case of the Major War Criminals*, Judgment, 1946, pp. 220–222.

[152] Arnold D. McNair and Arthur D. Watts, *The Legal Effects of War*, Cambridge University Press, 1966, p. 423.

[153] This may also be the case if, for instance, a State's armed forces stay in the territory of another State once the latter has withdrawn its consent to their presence. See e.g. Roberts, 2005, pp. 43–44, and Dörmann/Colassis, pp. 309–311. See also para. 322 of this commentary.

territory. A lack of military opposition by the local sovereign should not be interpreted as a form of consent to the foreign forces' presence in its territory precluding the application of the law of occupation, but rather a decision made under duress.[154] In this context, the foreign forces' presence clearly results from military coercion and is to be qualified as hostile, providing evidence of the belligerent character of the occupation.

322 The fact that the occupation does not meet with armed resistance does not mean that the Occupying Power is 'accepted' by the local population and that the latter does not require legal protection. Whenever civilians and civilian property find themselves under the military and administrative control of a belligerent enemy, including during occupation without hostilities, there is a risk of arbitrariness and abuse. Therefore, the rationale for the application of humanitarian law still exists when occupation is established without armed resistance. The fact that part of the local population may welcome the foreign forces has no impact on the classification of the situation as an occupation.

323 It should be specified that multinational forces operating under UN command and control in accordance with a UN Security Council resolution and with the consent of the host State would not be considered as occupying forces.[155] In such cases, the basis for the lack of armed resistance to the force lies in the State's clearly communicated consent for the presence and operations of the multinational force. However, in a situation in which such a multinational force remains in a State and continues to operate in the absence of the consent of the host State, or when it is deployed without such consent, that force (or the States contributing troops to it) may meet the criteria for occupation, no matter the legal basis of their mandate.[156]

324 The existence of an occupation within the meaning of humanitarian law prompts the application of the four Geneva Conventions in their entirety. It triggers in particular the application of Part III, Section III of the Fourth Convention ('Occupied Territories') and other norms governing occupation set forth in other treaties such as the 1907 Hague Regulations and Additional Protocol I, for Parties thereto.[157]

[154] A clear distinction should be made between the absence of opposition to foreign troops' deployment in the territory of another State and formal consent given by the local sovereign, the former not necessarily implying the latter.

[155] See Roberts, 1984, pp. 289–291; Dinstein, 2009, p. 37; Kolb/Vité, pp. 102–103; and Michael Kelly, *Restoring and Maintaining Order in Complex Peace Operations*, Martinus Nijhoff Publishers, 1999, pp. 167–181. See also section E.4.e.

[156] Most consider this possibility as existing in the case of what is commonly known as an 'enforcement operation' or 'peace enforcement'. See Alexandre Faite, 'Multinational Forces Acting Pursuant to a Mandate of the United Nations: Specific Issues on the Applicability of International Humanitarian Law', *International Peacekeeping*, Vol. 11, No. 1, 2007, pp. 143–157, especially at 150–151; Shraga, 1998, pp. 64–81, especially at 68–70; Kolb/Vité, pp. 99–105; and Dinstein, 2009, p. 37. See also Benvenisti, pp. 62–66.

[157] See Hague Regulations (1907), Articles 42–56, and Additional Protocol I, notably Articles 14, 15, 63 and 69.

2. The definition of the concept of occupation

325 The law of occupation, more particularly the provisions contained in Part III, Section III of the Fourth Convention, constitutes the most detailed and protective set of norms afforded by humanitarian law to 'protected persons' as defined under Article 4 of that Convention. Therefore, it is essential to delineate with precision the notion of occupation as, insofar as the armed conflict leading to the occupation has not already done so, it will trigger the application of the law of occupation and also the relevant provisions of the First, Second and Third Conventions, as well as Additional Protocol I, for Parties thereto.

326 This delineation is not easy owing to a number of potentially complicating factors, such as a continuation of hostilities, the continued exercise of a degree of authority by the local government, or the invading Party's refusal to assume the obligations stemming from the exercise of its authority over a foreign territory.

327 The determination of the existence of an occupation is rendered even more complex by the absence in the Geneva Conventions of a definition of occupation. Instead, the notion of occupation has only been sketched out by Article 42 of the 1907 Hague Regulations, which reads: 'Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.' Subsequent treaties, including the Geneva Conventions, have not altered this definition.

328 As discussed above, the notion of occupation in Article 2(2) specifically includes occupation that has encountered no armed resistance. However, beyond the addition ensuring that such scenarios are covered, nothing in the preparatory work indicates that the drafters of the Conventions intended to change the widely accepted definition of occupation contained in Article 42 of the Hague Regulations; they only wanted to clarify its content.[158]

329 Since common Article 2 explicitly recognizes the application of these instruments to all cases of occupation but fails to define the notion of occupation, one can logically conclude that the applicability of the relevant norms of the Conventions is predicated on the definition of occupation laid down in Article 42 of the Hague Regulations. This is also suggested by Article 154 of the Fourth Convention governing the relationship between this instrument and the 1907 Hague Conventions.[159] As stipulated in that article, the Fourth Convention is supplementary to the Hague Regulations. In other words, the

[158] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 650, 672, 675–676, 728 and 811. See also ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, paras 78 and 89; ICTY, *Naletilić and Martinović* Trial Judgment, 2003, para. 215; and Dinstein, 2009, pp. 6–7. See also Kolb/Vité, pp. 70–71.

[159] For further details, see the commentary on Article 154 of the Fourth Convention.

Fourth Convention builds on the Hague Regulations but does not replace them for the purposes of defining the notion of occupation.

330 The law of occupation is thus a normative construction essentially made up of the Hague Regulations, the Fourth Convention and, when applicable, Additional Protocol I.[160]

331 This interpretation of the concept of occupation is confirmed by the International Court of Justice and the ICTY, which have described Article 42 of the Hague Regulations as the exclusive standard for determining the existence of an occupation under humanitarian law.[161]

332 Therefore, as the concept of occupation as used in the Geneva Conventions is not distinct from that used in the Hague Regulations, the conditions for determining whether an occupation exists are based on Article 42 of the Hague Regulations.[162]

333 As mentioned in the commentary on common Article 2(1), the existence of an occupation as a type of international armed conflict must be determined solely on the basis of the prevailing facts. A determination based on the prevailing facts conforms to the strict separation of *jus in bello* and *jus ad bellum* and has been endorsed by the US Military Tribunal at Nuremberg which stated that 'whether an invasion has developed into an occupation is a question of fact'.[163]

334 Considering the notion of occupation to be the same in the 1907 Hague Regulations and the 1949 Geneva Conventions does not mean that certain rules of the law of occupation cannot be applicable during the invasion

[160] It has been argued that two distinct definitions of occupation exist, one drawing on the Hague Regulations and the other on the Fourth Geneva Convention. See Pictet (ed.), *Commentary on the Fourth Geneva Convention*, ICRC, 1958, p. 60; Sassòli, 2012, pp. 42–50; Akande, pp. 44–48; and Koutroulis, pp. 719–728. However, in the absence of any express definition of occupation under the Fourth Convention and given the operation of its Article 154, the assertion that the Geneva Conventions provide a distinct definition of occupation is not unanimously accepted (see Zwanenburg, 2012a, pp. 30–36, and Ferraro, 2012b, pp. 136–139).

[161] The ICTY has used the definition of occupation contained in the Hague Regulations in various decisions in order to determine whether an occupation existed within the meaning of the Fourth Convention. Relying on Article 154 of the Convention, it decided that:

> [W]hile Geneva Convention IV constitutes a further codification of the rights and duties of the occupying power, it has not abrogated the Hague Regulations on the matter. Thus, in the absence of a definition of 'occupation' in the Geneva Conventions, the Chamber refers to the Hague Regulations and the definition provided therein, bearing in mind the customary nature of the Regulations.

Naletilić and Martinović Trial Judgment, 2003, para. 215. The Trial Chamber then quoted Article 42 of the Hague Regulations and specified that it endorsed this definition (*ibid.* para. 216). In its 2004 Advisory Opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and in its 2005 Judgment in *Armed Activities on the Territory of the Congo case*, the ICJ relied exclusively on Article 42 of the Hague Regulations to determine whether an occupation existed in the territories in question and whether the law of occupation applied in those situations.

[162] For a further discussion, see the commentary on Article 6 of the Fourth Convention. See also United Kingdom, *Military Manual*, 1958, p. 141, para. 501; United States, *Field Manual*, 1956, p. 138, para. 352(b); and ICTY, *Naletilić and Martinović* Trial Judgment, 2003, paras 221–222.

[163] United States, Military Tribunal at Nuremberg, *Hostages case*, Judgment, 1948. The same approach has been reaffirmed in ICJ, *Armed Activities on the Territory of the Congo case*, Judgment, 2005, para. 173, and ICTY, *Naletilić and Martinović*, Trial Judgment, 2003, para. 211.

phase. Some norms of the law of occupation may well apply during the invasion phase.

3. The constitutive elements of occupation

335 In order to identify the elements constituting the notion of occupation, one must first examine the concept of effective control, which is at the heart of the notion of occupation and has long been associated with it. The phrase 'effective control' is very often used in relation to occupation; however, neither the Geneva Conventions nor the 1907 Hague Regulations contain any reference to it. 'Effective control' reflects a notion developed over time in the legal discourse pertaining to occupation to describe the circumstances and conditions for determining the existence of a state of occupation.[164]

336 It is self-evident that occupation implies some degree of control by hostile troops over all or part of a foreign territory in lieu of the territorial sovereign. However, under humanitarian law, it is the effectiveness of that control that sets off the application of the law of occupation. Indeed, only effective control will allow the foreign troops to apply the law of occupation. In this regard, 'effective control' is an essential concept as it substantiates and specifies the notion of 'authority' lying at the heart of the definition of occupation contained in Article 42 of the Hague Regulations. Accordingly, effective control is the main characteristic of occupation as there cannot be occupation of a territory without effective control exercised over it by hostile foreign forces. However, effective control does not require the exercise of full authority over the

[164] The notion of 'effective control' in relation to occupation is distinct from the notion of effective control in the law on State responsibility. The choice of the word 'effective', which is commonly associated with the notion of control in order to define the nature of the foreign forces' ascendancy over the territory in question, reflects the analogy made between occupation and blockade during the negotiations related to the 1874 Brussels Declaration. During the drafting of the Declaration, the delegates, almost without exception, pointed out the similarities between occupation and blockade: both had to be effective to be said to exist for the purposes of the law of armed conflict. See Marten Zwanenburg, 'The law of occupation revisited: the beginning of an occupation', *Yearbook of International Humanitarian Law*, Vol. 10, 2007, pp. 99–130 at 102; Shane Darcy and John Reynolds, 'An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law', *Journal of Conflict and Security Law*, Vol. 15, No. 2, 2010, pp. 211–243, at 218–220; Thomas J. Lawrence, *The Principles of International Law*, 6th edition, Macmillan & Co., London, 1917, pp. 435–436; and James M. Spaight, *War Rights on Land*, Macmillan & Co., London, 1911, pp. 328–329. It was argued that, just as blockades are not recognized unless they are effective, the existence of occupations, too, must be decided on the basis of effective control. In this regard, a consensus emerged among the delegates indicating that, in fact, an occupation would come into existence only to the extent to which the foreign army could exercise a certain degree of control over the territory in question. See Doris A. Graber, *The Development of the Law of Belligerent Occupation 1863–1914: A Historical Survey*, Columbia University Press, New York, 1949.

territory; instead, the mere capacity to exercise such authority would suffice. Military occupation can be said to exist despite the presence of resistance to it and can be said to exist even when some part of the territory in question is temporarily controlled by resistance forces.[165]

337 Even if the Geneva Conventions do not contain any definition of occupation, the 1907 Hague Regulations and their preparatory work, academic literature, military manuals and judicial decisions demonstrate the pre-eminence accorded to three elements in the occupation equation, namely the unconsented-to presence of foreign forces, the foreign forces' ability to exercise authority over the territory concerned in lieu of the local sovereign, and the related inability of the latter to exert its authority over the territory. All together, these elements constitute the so-called 'effective control test' used to determine whether a situation qualifies as an occupation for the purposes of humanitarian law. These three elements are also the only ones that – cumulatively – reflect the tension of interests between the local government, the Occupying Power and the local population, which is characteristic of a situation of belligerent occupation.[166]

338 On this basis, the following three cumulative conditions need to be met in order to establish a state of occupation within the meaning of humanitarian law:[167]

- the armed forces of a State are physically present in a foreign territory without the consent of the effective local government in place at the time of the invasion;
- the effective local government in place at the time of the invasion has been or can be rendered substantially or completely incapable of exerting its powers by virtue of the foreign forces' unconsented-to presence;

[165] United States, Military Tribunal at Nuremberg, *Hostages case*, Judgment, 1948, pp. 55–59. The UK military manual stipulates:

> The fact that some of the inhabitants are in a state of rebellion, or that guerrillas or resistance fighters have occasional successes, does not render the occupation at an end. Even a temporarily successful rebellion in part of the area under occupation does not necessarily terminate the occupation so long as the occupying power takes steps to deal with the rebellion and re-establish its authority or the area in question is surrounded and cut off.

Manual of the Law of Armed Conflict, 2004, p. 277, para. 11.7.1. However, if foreign armed forces are required to engage in significant combat operations to recapture the area in question from forces of the local armed resistance, that part of the territory cannot be considered to be occupied until the foreign forces have managed to re-establish effective control over it. See also United States, *Law of War Manual*, 2016, para. 11.2.2.1. See also ICRC, *Occupation and Other Forms of Administration of Foreign Territory*, pp. 16–26; Dinstein, 2009, pp. 42–45; and Roberts, 2005, p. 34.

[166] See also ICRC, *Occupation and Other Forms of Administration of Foreign Territory*, pp. 16–26.

[167] For a detailed analysis of the constitutive elements of the notion of occupation, see Ferraro, 2012b, pp. 133–163; Sassòli, 2015; Dinstein, 2009, pp. 31–45; and Benvenisti, pp. 43–51. See also ICRC, *Occupation and Other Forms of Administration of Foreign Territory*, pp. 16–35.

– the foreign forces are in a position to exercise authority over the territory concerned (or parts thereof) in lieu of the local government.[168]

339 The end of an occupation may also be difficult to assess from a legal perspective. Progressive phasing out, partial withdrawal, retention of certain responsibilities over areas previously occupied, the maintenance of a military presence on the basis of consent that is open to question, or the evolution since the Hague Regulations of the means of exercising control: all of these issues can complicate the legal classification of a given situation and raise numerous questions about when an occupation may be said to have ended.[169]

340 In principle, the effective control test applies equally for establishing the beginning and the end of an occupation. In fact, the criteria for establishing the end of occupation are generally the same as those used to determine its beginning,[170] but in reverse.[171] Therefore, the physical presence of foreign forces, their ability to enforce authority over the territory concerned in lieu of the existing local governmental authority, and the continued absence of the local government's consent to the foreign forces' presence, cumulatively, should be scrutinized when assessing if an occupation has been terminated. If any of these conditions ceases to exist, the occupation can be considered to have ended.

[168] While occupation law assumes that the Occupying Power will bear all responsibility in occupied territory as the result of the enforcement of its military domination, it also allows a vertical sharing of authority. The Occupying Power may determine – in accordance with humanitarian law – to what degree it exercises its powers of administration and which powers it leaves in the hands of the occupied authority. Such a situation does not affect the factual existence of effective control exerted by the Occupying Power over the occupied territory. See Ferraro, 2012b, pp. 148–150, and ICRC, *Occupation and Other Forms of Administration of Foreign Territory*, p. 20. See also Israel, Supreme Court sitting as High Court of Justice, *Tzemel case*, Judgment, 1983, pp. 363–364.

[169] Occupation may also end after a treaty of peace in which the restored sovereign may choose to cede title over the occupied territory to the Occupying Power insofar as such cession complies with the requirements of Article 52 of the 1969 Vienna Convention on the Law of Treaties.

[170] Shraga has argued that Article 6(3) of the Fourth Convention created a new definition of the end of occupation, one that changed the criterion from effective control to the exercise of functions of government; see Daphna Shraga, 'Military Occupation and UN Transitional Administrations – the Analogy and its Limitations', in Marcelo G. Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law: Liber Amicorum Lucius Caflisch*, Martinus Nijhoff, Leiden, 2007, pp. 479–498, at 480–481. However, it is submitted that this position is premised on a misinterpretation of Article 6(3). This provision was never intended to provide a criterion for assessing the beginning and end of occupation, but only to regulate the end or the extent of the Fourth Convention's applicability on the basis that occupation would still continue. Article 42 of the 1907 Hague Regulations and Article 6(3) of the Fourth Convention are two distinct provisions pertaining to different specific material circumstances. Therefore, Article 6(3) cannot be used as a provision of reference for determining the end of occupation. See Ferraro, 2012b, p. 149.

[171] Yuval Shany, 'Faraway, So Close: The Legal Status of Gaza after Israel's Disengagement', *Yearbook of International Humanitarian Law*, Vol. 8, 2005, pp. 369–383, at 378. The identical nature of the tests for determining the beginning and the end of an occupation can be deduced from the legal literature and military manuals, as these do not distinguish between the criteria to be used for assessing the beginning or the end of an occupation, implying that the test is the same for both. See Kolb/Vité, p. 150.

341 However, in some specific and exceptional cases – in particular when foreign forces withdraw from occupied territory (or part thereof) while retaining key elements of authority or other important governmental functions that are typical of those usually taken on by an Occupying Power – the law of occupation might continue to apply within the territorial and functional limits of those competences.[172]

342 Indeed, although the foreign forces are not physically present in the territory concerned, the authority they retain may still amount to effective control for the purposes of the law of occupation and entail the continued application of the relevant provisions.[173]

343 Today, the continued exercise of effective control from outside a previously occupied territory cannot be discarded. Indeed, it may be argued that technological and military developments have made it possible to assert effective control over all or parts of a foreign territory without a continuous military presence in the area concerned. In such situations, it is important to take into account the extent of authority retained by the foreign forces rather than focusing exclusively on the means by which it is actually exercised. One should also recognize that, in these circumstances, any geographical contiguity existing between the belligerent States might play a key role in facilitating the remote exercise of effective control, for instance by permitting an Occupying Power that has relocated its troops outside the territory to make its authority felt within reasonable time.

344 This functional approach to occupation would thus be used as the relevant test for determining the extent to which obligations under the law of occupation remain incumbent on hostile foreign forces that are phasing out or suddenly withdrawing from an occupied territory while retaining a certain authority over it. This test applies to the extent that the foreign forces still exercise within all or part of the territory governmental functions acquired when the occupation was undoubtedly established and ongoing.

345 This approach also permits a more precise delineation of the legal framework applicable to situations where it is difficult to determine with certainty if the occupation has ended or not. This is all the more important insofar as the law of occupation does not expressly address the question of the legal obligations applicable during unilateral withdrawal from an occupied territory. The silence on this issue is notably due to the fact that occupation usually ends by force, by agreement, or by a unilateral withdrawal often followed by a related empowerment of the local government. In most of the cases, the foreign forces leaving

[172] ICRC, *Occupation and Other Forms of Administration of Foreign Territory*, pp. 31–33; Ferraro, 2012b, p. 157.

[173] The relevant provisions will depend on the nature of the competences retained. It is therefore not possible in the abstract to identify specific norms except the overarching Article 43 of the 1907 Hague Regulations.

the occupied territory do not continue – at least not without the consent of the local government – to exercise important functions there.

346 The continued application of the relevant provisions of the law of occupation is indeed particularly important in that it is specifically equipped to deal with and regulate the sharing of authority – and the related assignment of responsibilities – between belligerent States.

347 A contrary position, which would not allow for the application of certain relevant provisions of the law of occupation in such specific situations, could encourage Occupying Powers to withdraw their troops from all or parts of the occupied territory while retaining some important functions remotely exerted in order to evade the duties imposed by humanitarian law.[174] Such an approach would ultimately leave the local population bereft of legal protection and would run counter to the object and purpose of the law of occupation.

4. Specific issues in relation to the notion of occupation

a. Territorial scope of occupation

348 The second sentence of Article 42 of the 1907 Hague Regulations indicates that the territorial extent of an occupation is commensurate with the capacity of the occupant to establish and project its authority over that territory, suggesting that some parts of the invaded territory might be beyond the occupant's effective control and therefore not considered as being occupied.

349 Common Article 2(2) confirms this approach insofar as it expressly refers to the notion of partial occupation. Together with Article 42 of the Hague Regulations, it rejects the idea that a territory is either fully occupied or not occupied at all. Such an approach would not take into account the variety of possible situations. Even though it is well accepted that a whole State could be occupied, Article 2(2) clarifies that occupation can be limited to parts of it. Nevertheless, neither Article 42 of the Hague Regulations nor common Article 2(2) indicates the precise delimitation of the geographical boundaries of an occupation. Under humanitarian law, nothing precludes even very small places (such as villages or small islands) from being occupied.[175] However, identifying

[174] Yuval Shany, 'Faraway, So Close: The Legal Status of Gaza after Israel's Disengagement', *Yearbook of International Humanitarian Law*, Vol. 8, 2005, pp. 369–383, at 380–383. See also Israel, Supreme Court sitting as High Court of Justice, *Bassiouni case*, Judgment, 2008, para. 12. But compare e.g. Dinstein, 2009, pp. 276–280, Michael Bothe, Cutting off electricity and water supply for the Gaza Strip: Limits under international law, preliminary expert opinion commissioned by Diakonia, 18 July 2014, p. 2, and ICC, Office of the Prosecutor, *Situation on Registered Vessels of Comoros, Greece and Cambodia, Article 53(1) Report*, 6 November 2014, para. 16.

[175] ICRC, *Occupation and Other Forms of Administration of Foreign Territory*, p. 24.

the exact boundaries of the occupied territory in the case of partial occupation might prove complicated.[176]

350 This difficulty arises because under the law of occupation, the notion of effective control does not require that the foreign forces inhabit every square metre of the occupied territory. Indeed, effective control can be exerted by positioning troops in strategic positions in the occupied territory, provided it is possible to despatch these troops, within a reasonable period of time, to make the occupant's authority felt throughout the area in question.[177] This situation can arise when parts of a territory have already fallen under the foreign forces' effective control while others are still subject to open hostilities, or when foreign forces' available resources are scarce in relation to the size of the enemy territory. The territorial limits of an occupation may also be difficult to determine when the occupying forces phase out from the occupied territory while maintaining effective control over specific areas.

351 Thus, the territorial dimension of an occupation may vary depending on the circumstances.[178]

b. Temporal scope of occupation

352 The question whether the law requires a minimum period of time in order to ascertain that an occupation is effectively established has not been addressed in detail.

353 It has been argued that a certain amount of time is necessary in order to distinguish the invasion phase from an occupation. According to this approach, occupation implies some degree of stability and requires some time before considering that the contested area has been solidly seized by the foreign forces and the local sovereign has been rendered substantially or completely incapable of exerting its powers by virtue of the foreign forces' unconsented-to presence.[179] In this regard, some experts have argued that effective control should be enforced for a certain amount of time before considering that a territory is occupied for the purposes of humanitarian law and that the Occupying Power is in a position to assume its responsibilities under the law of occupation.[180]

354 However, the law of occupation does not set specific time limits for occupation and, in fact, is silent on the subject of minimum duration.[181] An occupation can be very short, lasting, for example, for only a few weeks or a few

[176] See, for example, the difficulty encountered by the ICJ in 2005 in setting the territorial limits of the Ugandan occupation of parts of the Democratic Republic of the Congo (*Armed Activities on the Territory of the Congo case*, Judgment, 2005, paras 167–180).
[177] See United States, *Field Manual*, 1956, p. 139.
[178] Dinstein, 2009, pp. 45–47.
[179] ICRC, *Occupation and Other Forms of Administration of Foreign Territory*, pp. 38–40.
[180] *Ibid*. p. 24.
[181] Dinstein, 2009, p. 39: '[T]here is no hard and fast rule as to the maximal length of time of a raid and a minimal duration of belligerent occupation.'

days.[182] The transition between the invasion phase and occupation can be very quick, in particular when the invading forces do not meet with armed resistance and have sufficient resources to be swiftly in a position to exert authority over the territory concerned.

355 Under the law of occupation, the notion of effective control does not require that the occupant be able to meet all the responsibilities assigned to it in order to determine that an occupation has come into existence. Rather, it allows for a gradual application of the law of occupation over time.

356 The law of occupation comprises both negative and positive obligations. Negative obligations, such as the prohibition on deporting protected persons outside the occupied territory, apply immediately, whereas positive obligations, the vast majority of them being obligations of means, would take effect over time according to the level of control exerted, the constraints prevailing in the initial phases of the occupation, and the resources available to the foreign forces. In a very short occupation, for example, the occupant is expected to provide the population with basic necessities such as water and food and not to deport protected persons, but it cannot be expected to set up a workable education or health system if it was not in place before the occupation or had collapsed as a result of the occupation. On the other hand, it would be required to allow existing systems to continue to function. In other words, duties incumbent on an Occupying Power are commensurate with the duration of the occupation. If the occupation lasts, more and more responsibilities fall on the Occupying Power.[183]

c. Occupation of territories whose international status is unclear

357 It has been argued that Part III, Section III of the Fourth Convention relating to occupied territories would only apply within the boundaries of a 'State' as defined by international law. Accordingly, only territory over which the sovereignty of a State has been effectively established could be considered as occupied territory.[184]

[182] The Eritrea-Ethiopia Claims Commission has endorsed this position: '[W]here combat is not occurring in an area controlled for just a few days by the armed forces of a hostile Power, the Commission believes that the legal rules applicable to occupied territory should apply'; *Central Front, Eritrea's Claims*, Partial Award, 2004, para. 57.

[183] ICRC, *Occupation and Other Forms of Administration of Foreign Territory*, pp. 18 and 24–26.

[184] This position finds its basis in the fact that Section III of the 1907 Hague Regulations is entitled 'Military authority over the territory of the hostile *state*' (emphasis added) and that common Article 2(2) refers to the territory of a 'High Contracting Party', a phrase that has been interpreted as designating a well-established State. According to this approach, the territory belonging to an entity not yet meeting the legal criteria of a State would not come within the ambit of the term 'High Contracting Party' mentioned in common Article 2(2). See Meir Shamgar, 'Legal concepts and problems of the Israeli military government: The initial stage', in Meir Shamgar (ed.), *Military Government in the Territories Administered by Israel 1967–1980: The Legal Aspects*, Vol. I, Harry Sacher Institute for Legislative Research and

358 However, this argument goes against the spirit of the law of occupation and has been widely rejected by case law[185] and legal literature.[186] Indeed, the unclear status of a territory does not prevent the applicability of the rules of the Fourth Convention, including those relating to occupied territory. For the Fourth Convention to apply, it is sufficient that the State whose armed forces have established effective control over the territory was not itself the rightful sovereign of the place when the conflict broke out or when the invasion meeting no armed resistance took place. Occupation exists as soon as a territory is under the effective control of a State that is not the recognized sovereign of the territory. It does not matter who the territory was taken from. The occupied population may not be denied the protection afforded to it because of disputes between belligerents regarding sovereignty over the territory concerned.[187]

359 This interpretation – according to which the term 'occupation' is meant to cover cases in which a State occupies territories with a controversial international status – is reflected in recent international decisions. As stated by the International Court of Justice in its Advisory Opinion in 2004:

> The object of the second paragraph of Article 2 is not to restrict the scope of application of the [Fourth Geneva] Convention, as defined by the first paragraph, by excluding therefrom territories not falling under the sovereignty of one of the contracting parties. It is directed simply to making it clear that, even if occupation effected during the conflict met no armed resistance, the Convention is still applicable.[188]

360 The Eritrea-Ethiopia Claims Commission took the same approach in 2004, stating:

> The Hague Regulations considered occupied territory to be territory of a hostile State actually placed under the authority of a hostile army, and the 1949 Geneva Convention Relative to the Protection of Civilian[s] . . . applies to 'all cases of partial or total occupation of the territory of a High Contracting Party.' However, neither text suggests that only territory the title to which is clear and uncontested can be occupied territory.[189]

Comparative Law, Jerusalem, 1982, pp. 31–43, and 'The observance of international law in the administered territories', *Israel Yearbook on Human Rights*, 1971, pp. 262–277.

185 For example, ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, para. 95.

186 See Greenwood, 1992, pp. 243–244; Roberts, 1984, p. 283; Benvenisti, p. 4; Kolb/Vité, pp. 81–85; Dinstein, 2009, pp. 20–25; Bothe, p. 794; and Gasser/Dörmann, pp. 270–271.

187 Eritrea-Ethiopia Claims Commission, *Central Front, Ethiopia's Claim*, Partial Award, 2004, para. 28.

188 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, para. 95.

189 Eritrea-Ethiopia Claims Commission, *Central Front, Ethiopia's Claim*, Partial Award, 2004, para. 29.

361 Any other interpretation would lead to a result that is unreasonable as the applicability of the law of occupation would depend on the invading State's subjective considerations. It would suffice for that State to invoke the controversial international status of the territory in question in order to deny that the areas in question are occupied territory and thus evade its responsibilities under the law of occupation.

d. Occupation by proxy

362 In the context of 'classic' occupation, armed forces of the occupying State are physically present in the occupied territory. However, situations such as the one that prevailed in the former Yugoslavia in the 1990s have shown that States, even without deploying their own armed forces (as defined under their domestic law) on the ground, might be acting in the territory of another State through armed groups operating on their behalf.

363 As noted above, occupation is established when forces exercise effective control over territory. Under humanitarian law, effective control over all or parts of a foreign territory may be exercised through surrogate armed forces as long as they are subject to the overall control of the foreign State.[190] Thus, a State could be considered as an Occupying Power when it exercises overall control over *de facto* local authorities or other local organized groups that are themselves in effective control of all or part of a territory.

364 The existence and relevance of this theory is corroborated by various decisions of international tribunals. In *Tadić*, for example, the ICTY decided that 'the relationship of de facto organs or agents to the foreign Power includes those circumstances in which the foreign Power "occupies" or operates in certain territory solely through the acts of local de facto organs or agents'.[191] In *Armed Activities on the Territory of the Congo*, the International Court of Justice examined whether Uganda exerted control over Congolese armed groups. The Court seemed to accept the possibility of an occupation being conducted through indirect effective control, but on the basis of the State exercising effective control over the armed group or groups in question.[192]

[190] See paras 298–306 of this commentary on overall control over an entity or an armed group. The question of overall control over the group or entity is distinct from the question whether that group or entity exercises effective control over the territory.

[191] ICTY, *Tadić* Trial Judgment, 1997, para. 584. The ICTY confirmed this interpretation in *Blaškić*, stating:

> In these enclaves, Croatia played the role of occupying Power through the overall control it exercised over the HVO [Croatian Defence Council], the support it lent it and the close ties it maintained with it. Thus, by using the same reasoning which applies to establish the international nature of the conflict, the overall control exercised by Croatia over the HVO means that at the time of its destruction, the property of the Bosnian Muslims was under the control of Croatia and was in occupied territory.

Blaškić Trial Judgment, 2000, para. 149. See also ICTY, *Prlić* Appeal Judgment, 2017, para. 325.

[192] ICJ, *Armed Activities on the Territory of the Congo case*, Judgment, 2005, paras 160 and 177.

365 The notion of indirect effective control has scarcely been addressed in the legal literature or in military manuals. It is submitted that the criterion requiring the military presence of hostile foreign troops is fulfilled when indirect effective control is ascertained. The overall control exerted over local entities themselves having effective control over the areas in question turns the individuals belonging to those entities into 'agents' or 'auxiliaries' of the foreign State. Such control exerted over these local entities reflects a real and effective link between the group of persons exercising the effective control and the foreign State operating through those surrogates.[193]

366 The theory of indirect effective control is important insofar as it prevents a legal vacuum arising as a result of a State making use of local surrogates to evade its responsibilities under the law of occupation.

e. Occupation by multinational forces[194]

367 For a long time, the applicability of the law of occupation to multinational forces, notably those under UN command and control, was rejected. It was argued that their special status under international law based on a specific mandate conferred by the UN Security Council, the altruistic nature of their actions and the perceived absence of antagonism between them and the local population were in contradiction with the concept of military occupation.[195]

368 However, the first argument mixes *jus ad bellum* and *jus in bello* and the reasoning disregards the fact that the applicability of the law of occupation is determined on the basis of the prevailing facts and the fulfilment of the criteria derived from Article 42 of the Hague Regulations, regardless of the mandate assigned to multinational forces.[196]

369 As per other forms of armed conflict, there is nothing in humanitarian law that would prevent the classification of multinational forces as an Occupying Power when the conditions for occupation are met.[197] The mandate assigned to

[193] The question of indirect effective control is addressed in the UK military manual:

> In some cases, occupying troops have operated indirectly through an existing or newly appointed indigenous government … In such cases, despite certain differences from the classic form of military occupation, the law relating to military occupation is likely to be applicable. Legal obligations, policy considerations, and external diplomatic pressures may all point to this conclusion.

Manual of the Law of Armed Conflict, 2004, p. 276, para. 11.3.1.

[194] For a definition of multinational forces for the purposes of this commentary, see fn. 86.

[195] Shraga, 1998, pp. 69–70.

[196] ICRC, *Occupation and Other Forms of Administration of Foreign Territory*, pp. 33–34. For a detailed analysis of this issue, see Tristan Ferraro, 'The applicability of the law of occupation to peace forces', in Gian Luca Beruto (ed.), *International Humanitarian Law, Human Rights and Peace Operations*, Proceedings of the 31st Round Table on Current Problems of International Humanitarian Law, International Institute of Humanitarian Law, San Remo, 2008, pp. 133–156.

[197] See Roberts, 1984, pp. 289–291; Christopher Greenwood, 'International Humanitarian Law and United Nations Military Operations', *Yearbook of International Humanitarian Law*, Vol. 1, 1998, pp. 3–34, at 28; Marco Sassòli, 'Legislation and Maintenance of Public Order and Civil Life

multinational forces by the international community in no way shields them from the operation of the law of occupation and from qualifying as an Occupying Power, in the same way as it would not do so for other actors. When a multinational force operating under UN command and control is implementing a mandate adopted by the UN Security Council under Chapter VI of the UN Charter, however, it is unlikely that such a multinational force will meet the criteria to be an Occupying Power.

370 Recent features of some multinational operations – in particular when multinational forces are deployed without the consent of the host State or in a country experiencing a breakdown of governmental authority and State infrastructure – further point to the relevance of the law of occupation as a legal framework in such situations and to the necessity to determine when and how this branch of humanitarian law applies to multinational forces.

371 The classic conditions for determining a state of occupation apply equally to multinational forces; however, the main difficulty lies in determining which among the participants in a multinational operation enforcing effective control over a territory should be considered Occupying Powers for the purposes of humanitarian law. For multinational forces under the command and control of an international organization, the international organization, in principle, should be considered to be the Occupying Power.[198]

372 This determination is particularly difficult with respect to an occupation run by a multinational force led by States.[199] The States participating in such multinational forces may be assigned different tasks within the operation. There are two options for determining which States participating in a multinational force that is exercising effective control over a territory can be classified as Occupying Powers. The first option consists of assessing the legal criteria for occupation for each troop-contributing State separately. In such situations, humanitarian law would require that to qualify as an Occupying Power, each State contributing to the multinational force needs to have troops deployed on the ground without the consent of the local governmental authority and be in a position to exert authority, in lieu of the displaced local government, over those parts of the occupied territory to which it is assigned.

by Occupying Powers', *European Journal of International Law*, Vol. 16, No. 4, 2005, pp. 661–694, at 689–690; and Kolb/Porretto/Vité, p. 218.

[198] Kolb/Vité, pp. 99–105. See also Benvenisti, p. 63 (with further references), and Dinstein, 2009, p. 37. While some continue to distinguish between 'peacekeeping' and 'peace enforcement' when it comes to the possibility of a UN commanded and controlled force as an Occupying Power due to the usual circumstances of the deployment of such forces, it is appropriate to rely on the facts of the situation and not the name given to the operation to draw a conclusion.

[199] See also paras 278–285 of this commentary.

373 The second option is a so-called 'functional approach'.[200] Pursuant to this approach, in addition to the States that individually fulfil the criteria of the effective control test, other States contributing to the multinational force that perform functions and tasks that would typically be carried out by an Occupying Power, and for which the law of occupation would be relevant, should also be classified as Occupying Powers. Accordingly, the actions of these contributing States and the functions assigned to them would turn them into Occupying Powers.

374 Despite the relevance of the functional approach, in practice it could be difficult to differentiate the legal status of the various States contributing to a multinational force occupying a country, taking into account the wide range of activities they carry out. Nevertheless, performing tasks under the command or instruction of the 'uncontested' Occupying Powers would tend to confer the status of Occupying Power on those cooperating with these Occupying Powers, particularly when such tasks are essential to the fulfilment of the administrative responsibilities stemming from the law of occupation.[201]

375 In addition, one should also recognize that the evolution of the Occupying Power's rights and duties vis-à-vis the occupied territory, and the acknowledged role of full-fledged administrator – as supposed by Article 43 of the Hague Regulations and Article 64 of the Fourth Convention – make it difficult to distinguish between core tasks assigned to an occupier (such as enforcing law and order) and other less emblematic tasks, since all of these tasks would fall under the competence of the occupier. Thus, a presumption seems to exist that those States participating in a multinational force exercising effective control over a foreign territory should be considered as occupying forces if they assume functions that would normally be among those of an Occupying Power. This presumption is rebuttable, however, for instance when a contributing State relinquishes operational command or control over its troops to another State participating in the multinational force.

F. Paragraph 3: Applicability of the Conventions when a Party to the conflict is not a Party to the Conventions

376 Common Article 2(3) deals with situations in which not all States that are Parties to a conflict are Parties to the Conventions. At the time of writing, the Geneva Conventions enjoy universal ratification, meaning that such situations should rarely arise. However, the potential formation of new States (no matter how infrequently that may occur) means that there may be a lapse between

[200] This approach was used by the ICRC in relation to the occupation of Iraq in 2003. See Dörmann/Colassis, pp. 302–304; ICRC, *Occupation and Other Forms of Administration of Foreign Territory*, pp. 34–35; and Ferraro, 2012b, pp. 160–162.

[201] See Roberts, 2005, p. 33, and Lijnzaad, p. 298.

https://doi.org/10.1017/9781108979320.006 Published online by Cambridge University Press

statehood and ratification of the Conventions, such that these provisions may become relevant.

377 An identical provision exists in Article 96(2) of Additional Protocol I.

1. *First sentence: Abolition of the* si omnes *clause*

378 The first sentence of Article 2(3) states that '[a]lthough one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations'. This sentence must be read in the context of Article 2 as a whole, which stipulates that the Conventions apply to a conflict between two or more High Contracting Parties. Thus, in a conflict between only two States, where one is not party to the Conventions (unless it 'accepts and applies' the Conventions, as it may do according to the second sentence of paragraph 3), the Conventions do not apply *de jure* to that conflict, although the substantive obligations will nonetheless be binding on the Parties to the extent they reflect customary international law.

379 Today, it may appear obvious and unnecessary to state that if there are three Parties to a conflict but only two of the opposing States are party to the Geneva Conventions, the Conventions nevertheless apply between those two Parties. However, this was not always the case. In fact, according to a provision in the 1906 Geneva Convention, as well as in the 1899 and 1907 Hague Conventions, *all* Parties to a conflict had to be Parties to the Conventions in order for the Conventions to apply.[202] This was known as the *si omnes* clause. When the 1906 Convention was revised in 1929, the abolition of the *si omnes* clause was put on the agenda in the light of the experience of the First World War.[203] After the

[202] See Hague Convention (II) (1899), Article 2:

> The provisions contained in the Regulations mentioned in Article 1 are only binding on the Contracting Powers, in case of war between two or more of them.
>
> These provisions shall cease to be binding from the time when, in a war between Contracting Powers, a non-Contracting Power joins one of the belligerents.

See also Article 2 of the 1907 Hague Convention (IV): 'The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting powers, and then only if all the belligerents are parties to the Convention.'

[203] During the First World War, strictly speaking the 1906 Geneva Convention was never in force for the Parties to the conflict as Montenegro was not a Party to the Convention; however, it was applied and invoked by virtually all of the States involved in the conflict; see Paul Des Gouttes, 'De l'applicabilité des Conventions de La Haye de 1889 et de 1907, ainsi que de celles de Genève de 1864 et de 1906', *Revue internationale de La Croix-Rouge et Bulletin international des Sociétés de la Croix-Rouge*, Vol. 1, No. 1, 1919, pp. 3–10. While most States continued to invoke the Conventions and considered them applicable, one, the United States, did not consider itself bound by the 1906 Convention owing to the operation of Article 24 (*si omnes* clause). Consequently, Germany refused to return captured US medical personnel. However, the United States apparently later changed its position. See Des Gouttes, *Commentaire de la Convention de Genève de 1929 sur les blessés et malades*, ICRC, 1930, p. 188, fn. 2. The Hague Conventions were in force until 1917, at which point several States not party to those Conventions joined the conflict.

discussion of various proposals, a provision almost identical to that in Article 2(3) was adopted in 1929.[204] It was maintained without debate in 1949.

380 The provision also has a particular relevance for States that participate in multinational operations – no matter whether their command structure is integrated or not – as co-belligerents or partners of a State that is not party to the Geneva Conventions (or Additional Protocol I). In such a situation, States party to the Conventions remain bound by their obligations in relation to all other States that are equally bound by these treaties.

2. *Second sentence:* De facto *application of the Conventions by a State not party*

381 During the Second World War, some of the States that were Parties to the conflict were not Parties to the 1929 Geneva Convention on Prisoners of War, which gravely undermined the protection of prisoners of war.[205] In this respect, there is an important difference between humanitarian law treaties and human rights law treaties: when one Party to a conflict is not bound by the Geneva Conventions, the State in conflict with that Party is not bound in relation to that State either, even when it is a Party to the Conventions, whereas human rights law treaties bind the States party to them at all times.[206] The second sentence of paragraph 3 was introduced in order to provide a remedy for such situations.

382 Various potential formulations of this provision were discussed during the Diplomatic Conference of 1949, including the possibility of requesting a Party to a conflict to accept to be bound by the Convention and providing a period of time to acquiesce to such a request, as well as the more pragmatic *de facto* approach ultimately chosen.[207]

383 The preparatory work indicates that States did not want to make a State Party's obligations solely contingent on another State's formal declaration of acceptance. Consequently, a State acting in a way that shows that it accepts and applies the Conventions is sufficient for both Parties to be fully subject to the obligations set out in the Conventions.[208] This has occurred on a number of occasions, for example during the Suez crisis in 1956.[209] Conversely, if a State

[204] Geneva Convention on the Wounded and Sick (1929), Article 25(2): 'If, in time of war, a belligerent is not a party to the Convention, its provisions shall, nevertheless, be binding as between all the belligerents who are parties thereto.'

[205] See Bugnion, pp. 169–170 and 176–194. This particular problem did not arise for the application of the 1929 Geneva Convention on the Wounded and Sick as it enjoyed more universal ratification than its counterpart on prisoners of war.

[206] However, in such a case, both Parties would still be bound by their customary obligations.

[207] *Final Record of the Diplomatic Conference of 1949*, Vol. II-B, pp. 53–55, and Vol. III, pp. 27–28.

[208] *Ibid.* Vol. II-B, pp. 53–55.

[209] Jean S. Pictet, *Humanitarian Law and the Protection of War Victims*, A.W. Sijthoff, Leiden, 1975, p. 52. The authorities of Bangladesh expressed their intention to respect the Geneva

that is not party to the Conventions explicitly refuses to accept that it is bound by them, Article 2(3) cannot operate to bring the Conventions into force for either Party.[210]

384 The importance of the *de facto* application of the Conventions is reduced in practice today because the Geneva Conventions have been universally ratified, and, in addition, their provisions are generally considered part of customary international law.[211]

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Conventions during the conflict between India and Pakistan in 1971; see 'Activités extérieures', *Revue internationale de la Croix-Rouge*, Vol. 54, No. 637, January 1972, pp. 20–29, at 20.

[210] In the conflict between Ethiopia and Eritrea, Eritrea did not accept the Geneva Conventions and did not accept that it was bound by them. See Eritrea-Ethiopia Claims Commission, *Prisoners of War, Ethiopia's Claim*, Partial Award, 2003, paras 24–28.

[211] See e.g. ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996, paras 79 and 82; Eritrea-Ethiopia Claims Commission, *Prisoners of War, Eritrea's Claim*, Partial Award, 2003, para. 40; and *Prisoners of War, Ethiopia's Claim*, Partial Award, 2003, para. 31.

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